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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

GULF OIL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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FEDERAL ENERGY REGULATORY COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Gulf Oil Corporation petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on September 7, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is printed in Appendix A, pp. 1a-58a.[1] The order of the Court of Appeals denying rehearing to Gulf, not yet reported, is printed in Appendix B, pp. 59a-62a. The

[1] The Appendices to this Petition containing the opinions below, the judgment, the agency opinions, and texts of the statutes involved have been printed in a separate volume.

opinion and orders of the Federal Power Commission, styled Opinion No. 780, are not yet reported and are printed in Appendix D, pp. 67a-94a. The Commission opinion and orders denying rehearing, styled Opinion No. 780-A, are not yet reported and are printed in Appendix E, pp. 95a-116a.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1977 (Appendix C, pp. 63a-65a). The order of the Court of Appeals denying Gulf's timely petition for rehearing was entered on September 26, 1977 (Appendix B, pp. 59a-62a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (successor to the Federal Power Commission) has jurisdiction to decide issues of contract interpretation establishing a producer's delivery obligations for a regulated sale of natural gas prior to receipt of decision of a Board of Arbitrators considering those issues in accordance with controlling provisions of the producer's sales contract, the Commission certificate authorizing the producer's sale under Section 7 of the Natural Gas Act, and the Federal Arbitration Act.

2. Whether the Commission has power under Sections 7(c) or 16 of the Natural Gas Act to order a natural gas producer to pay "refunds" or "damages" to a pipeline purchaser as "compensation" for underdeliveries of

[2] On October 1, 1977, the Federal Energy Regulatory Commission succeeded to the functions and duties of the Federal Power Commission under the Natural Gas Act (Department of Energy Organization Act, 91 Stat. 565 (1977), 42 U.S.C. § 7101, Note). References to "the Commission" in this Petition are to both agencies.

natural gas during periods when all amounts collected by the producer have been in accordance with the producer's filed, effective rates under Section 4 of that Act and no amounts have been collected subject to refund.

3. Whether the Court of Appeals erred in affirming Commission conclusions as to a natural gas producer's daily delivery obligations by disregarding evidence as to industry practice and past agency recognition of daily "swing" provisions customary in producers' sales contracts, and by refusing to remand for further Commission proceedings in light of relevant Commission documents, reflecting errors in the Commission's conclusions, which were released by the Commission under the Freedom of Information Act only after judicial review commenced.

STATUTES INVOLVED

Sections 1, 2, 3 and 4 of the Federal Arbitration Act, 61 Stat. 670 and 671 (1947), 9 U.S.C. §§ 1, 2, 3 and 4, are set forth in Appendix F, pp. 124a-127a. Sections 4, 7(b), 7(c), 7(e), 16, and 19(b) of the Natural Gas Act, 52 Stat. 821, 822, 824, 830, 831 (1938), as amended, 15 U.S.C. §§ 717(c), 717f(b), 717f(c), 717f(e), 717o, and 717r(b), are set forth in Appendix F, pp. 117a-124a.

STATEMENT

In 1963, Gulf Oil Corporation (Gulf) applied to the Commission under Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing a proposed sale of natural gas by Gulf to Texas Eastern Transmission Corporation (Texas Eastern), an interstate pipeline company (I App. 5-6).[3] The application, precedent agreement, and other documents sub-

[3] References to the three volume Appendix in the Court of Appeals are to the volume and page number as used below (*e.g.*, I App. ——, II App. ——, III App. ——, *etc.*).

mitted showed that Gulf proposed to deliver natural gas under what has been termed a "warranty" contract, providing, *inter alia*, a term of 26 years from the date of initial delivery or until 4,437,675,000 thousand cubic (Mcf), or approximately 4.4 trillion cubic feet (Tcf), are delivered, whichever first occurs; a daily contract quantity (DCQ) of 500,000 Mcf; and a "swing" provision under which Texas Eastern may nominate, at any time and from time to time, a daily quantity up to 125% of the DCQ, or a maximum of 625,000 Mcf per day (III App. 1112-1116, 1127-1132).

The contract did not provide for dedication or commitment of specific producing fields, but provided for deliveries at Gulf's processing plant near Venice, Louisiana (III App. 1105-1106; 1133-1134). The contract recited that Gulf contemplated sale of natural gas produced "from fields located in southern Louisiana, offshore thereof and from fields located in the general area of the pipeline system of Texas Eastern" (I App. 10-42); and in its 1963 submission to the Commission, Gulf showed that it had estimated reserves of approximately 2.7 trillion cubic feet (Tcf) in the West Delta Block 27 Field available for delivery to Texas Eastern (II App. 550-552; I App. 6). The contract also included provisions for the price to be charged by Gulf over the life of the contract (III App. 1127-1132); for operation of *force majeure* if certain specified events impaired Gulf's ability to deliver (III App. 1118); and for binding, compulsory arbitration of any dispute between the buyer and seller arising out of the agreement (III App. 1122).

Gulf's 1963 application was the subject of public notice, but not of formal hearings before the Commission (I App. 54-59). Instead, the Commission's Staff reviewed Gulf's application and supporting documents, companion applications filed by Texas Eastern and another pipeline, and data supplied by the applicants in conferences with

the Commission's Staff, including data on the estimates of Gulf's available reserves in the West Delta Block 27 Field. Thereafter, the Commission considered the applications on the basis of the submissions of the applicants and Staff Memoranda summarizing the contract, including the "swing" provisions and contemplated operations thereunder, and data as to the West Delta Block 27 Field reserves.

On December 19, 1963, the Commission issued certificates to Gulf, Texas Eastern, and another pipeline applicant, noting the nature of the "warranty" contract; the availability of the DCQ of 500,000 Mcf to Texas Eastern and Texas Eastern's intent to take higher quantities on "peak" days; and the proposal to deliver gas produced "from reserves located in fields in southern Louisiana, primarily the West Delta Block 27 Field, Plaquemines Parish, Louisiana" (I App. 54-68). The Commission found the sale as proposed to be in the public interest and issued a certificate under Section 7(c) of the Act as sought by Gulf with no conditions other than to require Gulf to accept the certificate within thirty days (I App. 69-70).

Gulf accepted the certificate, filed its contract with Texas Eastern as Gulf's Rate Schedule No. 278 under Section 4 of the Natural Gas Act, and commenced deliveries to Texas Eastern in 1964 (I App. 69; III App. 1101). Shortly thereafter, it was discovered that the estimates of reserves in the West Delta Block 27 Field were substantially in error and insufficient to support Gulf's projected deliveries to Texas Eastern (III App. 1242-1243).[4] Gulf then commenced connecting other fields,

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[4] Some sands in the field thought to be hydrocarbon-bearing contained fresh water, a circumstance unheard of at the time for the depth involved. Other sands which tested productive from one well proved to be impermeable in another; and the unusual thickness of sands—up to a maximum of 340 feet—magnified errors in estimates

amended the contract to add new delivery points in the Southern Louisiana area, and purchased gas from other producers for redelivery by Gulf to Texas Eastern at substantial losses to Gulf (II App. 556-557; III App. 1061, 1234-1236, 1245, 1440).[5]

During this period, the Department of the Interior imposed a moratorium on general sales of offshore Louisiana leases,[6] and by 1971, Gulf had no uncommitted reserves or unexplored leases of consequence in Southern Louisiana (I App. 126, III App. 1062, 1247) and projected that it would be unable to deliver the daily contract quantity to Texas Eastern beyond 1973. Gulf and Texas Eastern then sought Commission approval of an amendment to the contract providing *inter alia* for dedication of specific reserves, price relief for Gulf, and extension of the contract term (III App. 1032-1060); but after hearings, the Commission in 1974 refused to approve the amendment, denied Gulf relief, and stated that it would hold Gulf to its "obligations" under the unamended contract (I App. 118-147, 185-195).

After resumption of regular general offshore Louisiana area lease sales in 1972, Gulf engaged in a vigorous exploration and development program on the leases acquired at the new sales. However, because of the unavoidable time required for such development and the construction

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(II App. 541-544). The Commission has found that there is no evidence that the errors in reserve estimates were other than "good faith" errors (I App. 137).

[5] As of September 30, 1975, Gulf had paid other producers $14,927,005 more for natural gas than Gulf could collect from Texas Eastern under the pricing provisions of the Gulf-Texas Eastern contract and Gulf's effective rates under Section 4 of the Natural Gas Act (II App. 541-544).

[6] During a ten-year period ending in September, 1972, the Department of the Interior held only two general offshore Louisiana lease sales (III App. 1062, 1247). In the succeeding three-year period it held eight such sales (III App. 1247).

of delivery facilities, Gulf was unable to maintain deliveries to Texas Eastern at 500,000 Mcf per day in 1974 and 1975.

On November 7, 1975, the Commission issued an order directing Gulf to show cause why it should not be required to fulfill its certificate obligations, directing presentation of evidence in formal hearings before an Administrative Law Judge (I App. 196-200). Gulf submitted evidence as directed, including evidence as to its deliveries, its purchases from others, expenditures for lease acquisitions and exploration and development, and its efforts to increase deliveries to Texas Eastern.[7] Gulf also submitted evidence as to its reserves and projections of deliveries showing that Gulf expected to be able to deliver the DCQ of 500,000 Mcf per day or more in 1977 and the total contract quantity of 4.4 Tcf by some time in 1987, three years before the expiration of the 26-year contract term (II App. 763-764, III App. 1254, 1257).

The record also showed that, by letters dated November 20, 1975 and July 16, 1976, Gulf had invoked the arbitration provisions of the contract to resolve disputes as to Gulf's contract delivery obligations, *i.e.*, (1) whether Gulf's delivery obligation is limited to gas which it is commercially practicable to deliver; (2) whether Gulf is excused from failure to deliver gas which resulted from mutual mistake of material facts as to reserves in the West Delta Block 27 Field or from the natural gas shortage; and (3) whether failure of the Department of the Interior to hold regular offshore Louisiana lease sales was an act of *force majeure* under the contract (III App. 1598-1599, 1611-1612). The Commission was advised that

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[7] *Inter alia*, Gulf showed that since September 1, 1972, Gulf had expended $576,315,000 in acquisition of offshore Louisiana leases, and had expended, in the past five years, $197,988,000 in exploration, development, and connection of these newly-acquired leases (III App. 1248-1249, 1522-1523).

Texas Eastern had sought to enjoin the arbitration proceeding in the United States District Court for the Southern District of Texas, Houston Division, on grounds that the Commission had primary jurisdiction, but that no injunction had been issued, and the proceedings before the Board of Arbitrators had commenced, as contemplated by the contract. Gulf's position therefore was that as to the issues submitted to arbitration, the Commission should withhold decision until completion of arbitration and receipt of the decision of the arbitrators.

The Commission Administrative Law Judge issued his decision on August 13, 1976, refusing to defer decision on issues submitted to arbitration, finding that Gulf had not complied with its contract and certificate obligations on any day Texas Eastern had demanded the maximum quantity of 625,000 Mcf and Gulf had not delivered that quantity, and recommending remedial orders by the Commission (I App. 237-264). Exceptions were filed by Gulf and others.

On October 15, 1976, the Commission issued Opinion No. 780 (Appendix D, pp. 67a-94a), finding Gulf had failed to deliver in accordance with its contract, ordering "refunds" for past deficiencies, and ordering increased deliveries. The Commission concluded that it was not required to await decision by the Board of Arbitrators and that Gulf's obligations were unaffected by the doctrine of commercial impracticability, by the mistake as to reserves in the West Delta Block 27 Field, or by the Department of the Interior moratorium on lease sales. The Commission also rejected Gulf's position that Gulf's daily delivery obligation is the 500,000 Mcf per day DCQ, averaged over a year, holding instead that Gulf is obligated to deliver the maximum or "peaking" volume of 625,000 Mcf per day each and every day Texas Eastern so demands. From this premise, the Commission concluded that during 1974, 1975, and 1976, on the days Gulf failed

to deliver 625,000 Mcf per day, Gulf was in violation of its contract and certificate; and that under Sections 7(c) and 16 of the Act, Gulf must "refund" to Texas Eastern, for flow-through to its customers, an amount then computed as $89,600,000 principal with interest for specific past periods as "damages" or "compensation" for the delivery deficiencies.[8] The Commission provided that Gulf could "recoup" such payments at a future date when the volume remaining to be delivered under the contract equaled the past deficiencies, but ordered continuous "refunds" if Gulf's future deliveries did not equal Texas Eastern's demand. The Commission further ordered that Gulf commence delivering the maximum or "peaking" volume of 625,000 Mcf on December 15, 1976, and advised that if Gulf failed to do so, the Commission would seek court enforcement of its order (Appendix D, pp. 89a-92a).

By Opinion No. 780-A, issued December 9, 1976, the Commission denied applications for rehearing and modified Opinion No. 780 only to provide (1) that if Gulf delivers in excess of 625,000 Mcf to Texas Eastern, the price will be increased to permit Gulf to recoup a portion of the "refunds" previously paid on an equivalent volume of gas, and (2) the Commission's orders as to "refunds" were not intended to preclude customers of Texas Eastern from seeking compensation for damages, if any, allegedly not compensated by Commission action (Appendix E, pp. 95a-116a).

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[8] The Commission's "refund" formula requires (1) determining the volume difference between Gulf's deliveries and Texas Eastern's demand, (2) determining the difference between Gulf's contract price of approximately 19 cents per Mcf and the higher maximum rates prescribed by the Commission for producers' sales in the Southern Louisiana area (ranging from 26 cents to $1.42 per Mcf); and (3) multiplying the volume deficiency by this price differential (Appendix D, pp. 78a-80a).

On review, the Court of Appeals affirmed the Commission (Appendix A, pp. 1a-58a).[9] On the questions presented here:

(1) A majority of the Court of Appeals concluded that the Commission had jurisdiction to decide the merits of issues submitted to arbitration despite their pendency before the Board of Arbitrators in accordance with the contract provision, the certificate, and the Federal Arbitration Act (Appendix A, pp. 12a-15a). The majority recognized that the Commission had approved the arbitration clause without condition, and that to decide issues of Gulf's contract and certificate obligations, the Commission "necessarily must resort to terms of the contract" (Appendix A, p. 14a). Nevertheless, the majority concluded the provision did not bind the Commission, that deferral by the Commission would "unnecessarily expend precious time, effort, and money" (Appendix A, p. 15a), and that the Commission's summary disposition of the merits of the arbitration issues was correct (Appendix A, p. 15a), even though Gulf's presentation on the issues submitted to arbitration was not in the record before the Commission or before the court. Dissenting, Judge Aldisert concluded that the Commission was required to defer decision in compliance with the Federal Arbitration Act, the binding provisions of the contract, and the Commission's own approval of those provisions in issuing the certificate to Gulf in 1963 (Appendix A, pp. 53a-58a).

(2) The Court of Appeals rejected Gulf's position that its daily delivery obligation is measured by the DCQ of 500,000 Mcf per day and accepted the Commission's interpretation that the maximum or "peaking" volume of 625,-

[9] On December 15, 1976, the Court of Appeals granted a temporary stay of the Commission's orders, and on December 22, 1976, granted Gulf's Motion For Stay pending completion of judicial review. On October 7, 1977, the court granted Gulf's Motion for stay of issuance of its mandate to and including October 26, 1977, and upon the filing of this Petition, until this Court disposes of the case.

000 Mcf must be delivered on any day demanded (Appendix A, pp. 8a-11a). The court did state "the question is close" and that it was disturbed by the "failure" of the Commission or intervenors to explain satisfactorily the use of the words "Daily Contract Quantity" in the contract (Appendix A, p. 11a). In seeking rehearing, Gulf pointed out that the court had not considered cited materials showing industry use and Commission recognition of such contract terms to fix daily delivery obligations and higher "peaking" quantities in the 1960s and 1970s. Alternatively, Gulf urged remand for Commission reconsideration, particularly in light of the Commission's 1963 Staff Memorandum analyzing the contract in a manner supporting Gulf and refuting the Commission's current interpretation, which had been released to Gulf under the Freedom of Information Act only on the eve of the June 7, 1977 oral argument in the Court of Appeals;[10] but Gulf's petition was denied (Appendix B, pp. 59a-62a).

(3) On the question of Commission power to order "refunds" or "damages," the Court of Appeals recognized that no amounts had been collected by Gulf subject to refund under Commission orders under Sections 4 or 7 of the Act, that the Commission had found no "abandonment" by Gulf under Section 7(b) of the Act, and that

[10] In review of Gulf's application in 1963, the Commission relied upon Staff Memoranda analyzing the contract and supporting data submitted by Gulf and Texas Eastern. In 1974, Gulf sought release of such memoranda under the Freedom of Information Act, but then was advised that such memoranda could not be located. In February, 1977, Gulf again sought release under the Freedom of Information Act, but initially was advised the documents still could not be located. On June 4, 1977, the Commission's Solicitor advised Gulf's counsel a copy of the 1963 Memorandum analyzing Gulf's application had been located. The Court of Appeals was so advised during oral argument on June 7, 1977, and Gulf lodged copies of this document with the court on June 13, 1977. In Gulf's view, contents of this Memorandum are and always have been critical to review of the issues of contract interpretation pending before the Commission and the Board of Arbitrators since 1975.

the Commission orders were without precedent under Section 7(c) of the Act (Appendix A, pp. 28a-32a). Nevertheless, the court reasoned that the Commission has authority to enforce certificate obligations under Section 7(c), and that Section 16 of the Act provides the Commission with "remedial powers," including substantive authority for the "refund" orders, characterized by the court as, in effect, a "temporary performance bond" (Appendix A, pp. 31a-38a). The court considered its conclusion consistent with, although more limited than, construction of Section 16 in *Mesa Petroleum Company* v. *Federal Power Commission*, 441 F.2d 182 (5th Cir. 1971), but expressly recognized conflict with the construction of Section 16 in *Mobil Oil Corporation* v. *Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973), that this section of the Act does not enlarge the Commission powers not otherwise provided by the Act (Appendix A, pp. 37a-38a). The Commission's "refund" orders, including provisions for future recoupment by Gulf attacked by intervenors, thus were affirmed (Appendix A, p. 39a). Gulf's petition for rehearing was denied without opinion (Appendix B, pp. 59a-62a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With Congressional Policy Expressed In The Federal Arbitration Act; Is In Conflict With Interpretation of That Act by This Court and Other Courts of Appeals; and Presents Important Questions of Relation of Agency Jurisdiction to Arbitration Which Should Be Resolved By This Court

The Court of Appeals has held that a federal regulatory agency may proceed to decide issues of contract interpretation without awaiting decision by a Board of Arbitrators to which those issues have been submitted in accordance with a contract requiring compulsory, binding

arbitration, with a certificate issued by the agency approving the arbitration provision, and with the provisions of the Federal Arbitration Act. In so holding, the court has disregarded controlling federal policy expressed in that Act, failed to apply principles of decisions of this Court and other Courts of Appeals requiring courts and agencies to defer to arbitration, and has misconstrued and misapplied the Federal Arbitration Act and the Natural Gas Act in resolving issues of the respective jurisdiction of the Commission and of a Board of Arbitrators. The decision thus presents federal questions of major and continuing importance under both of these federal statutes, which should be resolved by this Court:

1. A majority of the Court of Appeals has reached a result conflicting with the established relationship between contracts, the regulatory scheme of the Natural Gas Act, and Commission authority to resolve questions submitted to arbitration.

Under the Natural Gas Act, a sale of natural gas for resale in interstate commerce cannot be made until the seller receives a certificate of public convenience and necessity from the Commission under Section 7(c) of that Act. Under Commission regulations, the seller files an application to sell in accordance with the terms of an attached gas sale contract. If a certificate is granted, the contract and the certificate become indistinguishable, except to the extent that specific "conditions" are attached to the certificate.[11]

In accordance with these regulations, Gulf filed its application with the terms of a contract attached (I App.

[11] Under Section 7(e), the Commission has power to attach to a certificate "conditions" the public convenience and necessity may require. However, "conditions" must be express and cannot be implied. *Michigan Consolidated Gas Company* v. *Panhandle Eastern Pipe Line Company*, 226 F.2d 60, 66-67 (6th Cir. 1955) *cert. den.*, 350 U.S. 987 (1956).

pp. 14-50); and the Commission found that "the sale proposed by Gulf * * * is required by the public convenience and necessity * * *," and ordered "that a certificate of public convenience and necessity is hereby issued to Gulf Oil Corporation for the sale of natural gas * * * [as] *proposed in its application* as hereinafter conditioned." No condition relative to the arbitration provision in the contract was made (I App. pp. 63-65).

Limitations on the scope of the Commission's authority with regard to contracts then became applicable. Those limitations were stated in *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956):

> "In construing the Act, we should bear in mind that *it evinces no purpose to abrogate private rate contracts as such.* * * * *The Natural Gas Act permits the relations between the parties to be established initially by contract*, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public." (350 U.S. at 338, emphasis supplied)
>
> * * * * *
>
> "*By preserving the integrity of contracts*, (the Act) *permits the stability of supply arrangements which all agree is essential to the health of the industry* * * *. The Act thus affords a reasonable accommodation between the conflicting interest of contract stability on the one hand and public regulation on the other. * * *" (350 U.S. at 344, emphasis supplied)

The court below recognized but failed to give effect to these principles. The court stated:

> "* * * it is to the Gulf-Texas Eastern contract that we must turn. The reason is that *the certificate alone has little substance.* * * * *The scope of the certificate, therefore, is in large part defined by the terms of the contract.*" (Appendix A, p. 8a, emphasis supplied).

However, the court did not recognize applicability of the *Mobile* construction to the arbitration provision of the contract, which the Commission had approved, and then proceeded to conclusions in conflict with the decisions of this Court and the courts of appeals and with controlling federal policy expressed in the Federal Arbitration Act.

The certificated contract in this case provides that "Any dispute arising between Seller and Buyer out of this Agreement shall be determined by a board of three arbitrators," and that "The action of a majority of the members of such board shall govern and their decision in writing shall be final and binding on the parties hereto" (III App. pp. 1122-1123). As the court of appeals was apprised, three issues are pending before a Board of Arbitrators for decision. These issues, as summarized by the court, were: "* * * whether Gulf's delivery obligations were wholly or partially excused by (1) commercial impracticality, (2) mutual mistake, or (3) *force majeure*" (Appendix A, p. 12a).[12]

Congressional policy expressed in the Federal Arbitration Act thus applies. As pointed out in the dissent, but ignored by the majority below, that Act expresses "the strong federal policy favoring enforcement of arbitration when the parties have mutually agreed to so resolve contract interpretation disputes" (Appendix A, p. 53a). The Act states:

> "A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * shall be *valid, irrevocable*, and *enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract." (Appendix F, pp. 124a-125a).

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[12] Details as to the arbitration issues appear at III App. 1611-1612.

This Court has consistently applied the principles of the Act requiring deferral to arbitration. In *Prima Paint Corporation* v. *Flood and Conklin*, 388 U.S. 395 (1967), the Court held that even fraud in the inception of a contract was a proper subject of arbitration, regardless of state law to the contrary; that a court can determine only whether the "making of the agreement for arbitration" was fraudulently induced; and that "in so concluding, we not only honor the plain meaning of the statute, but also the unmistakably clear Congressional purpose that the arbitration procedure when selected by the parties to the contract, be speedy and not subject to delay and obstruction in the courts" (388 U.S. at 404). Similarly, in *William E. Arnold Company* v. *Carpenters District Council*, 417 U.S. 12 (1974), this Court approved the statement of the National Labor Relations Board that:

> "'When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that *those procedures should be afforded full opportunity to function* . . . We believe it to be consistent with the fundamental objectives of Federal law to require the parties . . . to honor their contractual obligations rather than, by casting (their) dispute in statutory terms, to ignore their agreed-upon procedures.'" (417 U.S. at 16-17, emphasis supplied).

Decisions of the Courts of Appeals and lower Federal courts are consistent.[13] The purpose and regulatory

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[13] *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2nd Cir. 1959), "Congress intended to exercise as much of its constitutional power as it could in order to make the new Arbitration Act as widely effective as possible."; *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064 (2nd Cir. 1972), "the federal law is to be implemented in such a way as to make arbitration effective"; *Hart* v. *Orion Insurance Company*, 453 F.2d 1358, 1360 (10th Cir. 1971), "federal substantive law controls the issue of enforceability" and speaks of an "overriding federal policy favoring arbitration"; *Germany* v. *River Terminal Railway Company*, 477 F.2d 546 (6th Cir. 1973); *Galt* v. *Libbey-Owens-Ford Glass Company*, 376 F.2d 711, 714 (7th Cir. 1967), "whenever possible the courts will use the Federal Arbitration Act to enforce agreements to arbitrate * * *"'; *Aerojet General Corporation* v. *American Arbitration Association*, 478 F.2d 248, 251 (9th Cir. 1973), "the use of arbitration * * * should be encouraged by the federal courts * * *"; *Georgia Power Company* v. *Cimarron Coal Corporation*, 526 F.2d 101 (6th Cir. 1975); *J. S. & H. Construction Company* v. *Richmond County Hospital Authority*, 473 F.2d 212 (5th Cir. 1973), "Congress has expressed a strong policy favoring arbitration before litigation * * *." See also *Williston on Contracts* (Jaeger) 3rd Ed., Sec. 1921. As pointed out in the dissenting opinion below (Appendix A, pp. 54a-56a), cases such as *American Safety Equipment Corporation* v. *J. P. Maguire & Company*, 391 F.2d 820 (2nd Cir. 1968), are not applicable because in this case, arbitration is consistent with the regulatory statute and with agency approval of the arbitration clause at the time it issued the certificate. Cases such as *Wilko* v. *Swan*, 346 U.S. 427 (1952), do not apply for similar reasons.

scheme of the Natural Gas Act, particularly as construed in *Mobile*, *supra*, are furthered by a proper determination of contract obligations of the parties in accordance with the contract and the Arbitration Act. Moreover, in this instance, the Commission had an opportunity, *before approving the contract*, to require elimination or modification of the arbitration clause, but the Commission chose not to do so. See discussion in dissenting opinion, Appendix A, p. 56a. The majority thus has disregarded the controlling effect of the Arbitration Act in a manner conflicting with decisions of this Court and other Courts of Appeals.

2. The majority affirmed the Commission on the grounds that (1) "The FPC is charged with the responsibility to enforce the certificate, and in the performance of its duty, the Commission necessarily must resort to the terms of the contract," and (2) the arbitration provision is inapplicable because the Commission was not a party to the contract (Appendix A, p. 14a). The in-

congruity of these conflicting grounds apparently escaped the court.

An arbitration provision is one of the "terms" of a contract to which the Commission must resort in its enforcement of certificates. Neither the Commission nor the court below could contest the fact that the issues submitted for arbitration were disputes which came within the language of the arbitration provision. Thus, when the Commission resorted to the terms of the contract, it had no option but to await the results of the arbitration before proceeding with its enforcement procedures. The whole purpose of arbitration of contract disputes is to determine the meaning of a contract.

The Commission had found that the entire contract, including the arbitration procedures, was in the public interest as the nexus between the contract and the certificate. The court's statement that the Commission was not a party to the contract begs the question. As the dissent points out, the Commission had the arbitration provision before it when it certificated the contract (Appendix A, p. 56a). The Commission could have conditioned the certificate to eliminate arbitration of contract disputes, and Gulf then would have been aware of the actual conditions under which it was undertaking the regulated service. As the dissent puts it:

> "* * * the Commission cannot have it both ways. It cannot *approve* a contract as the basis of a certificate in the public interest and *later*, after performance by the parties, *abrogate* crucial portions of the approved contract ostensibly in the same public interest. Although cloaked with much authority, the Commission has no power to rewrite a contract it has approved." (Appendix A, p. 56a, emphasis supplied)

3. The court's decision would extend the authority of the Commission, and by implication, that of other regulatory agencies, to give ostensible approval to contract

provisions under which certificated service is commenced, but without being bound to honor the provisions it has approved. Proper administration of the Natural Gas Act thus is involved, and this case presents issues as to whether regulatory agencies may so entrap the regulated entity. Just as sellers receiving certificates of public convenience and necessity are expected to live up to their commitments, sellers, in turn, should be able to rely upon the regulatory agencies issuing such certificates to honor contractual provisions they have approved.

The court's suggestion that arbitration would be a "futility" because the Commission "would ultimately be free to ignore completely the arbitration results" (Appendix A, p. 15a)[14] reflects a misunderstanding of the effect of arbitration. That effect is more accurately stated in the dissenting opinion:

> "It is not whose interpretation of the contract provisions ultimately prevails; rather, it is whether the parties and the Commission should be bound by their agreement as to the *procedure* for the initial resolution of interpretation conflicts." (Appendix A, pp. 57a-58a)

To say that an agency, upon receipt of an arbitration decision can and should discharge its regulatory responsibilities does not mean that the agency can ignore the results of an arbitration. In an ordinary case, the Commission may make an *initial* interpretation of a contract, subject to judicial review *de novo*.[15] Here, where arbitra-

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[14] The court's statement that this was Gulf's view (Appendix A, p. 15a) was in error. Gulf's position, as stated in its Initial Brief to the court, was: "Arbitration will not impinge on the Commission's discharge of its responsibilities, once the contract questions are determined in the manner provided in the contract" (p. 24).

[15] See *Texas Gas Transmission Corporation* v. *Shell Oil Company*, 363 U.S. 263 (1960); *Warren Petroleum Corporation* v. *Federal Power Commission*, 282 F.2d 312 (10th Cir. 1960).

tion procedures have been certificated, the *initial* interpretation of the contract, when arbitration is invoked, is left to a Board of Arbitrators.

Nothing in the Arbitration Act, or in the many cases recognizing Congressional policy favoring such arbitration, indicates that the decision of the arbitrators would be a nullity. However, the extent to which an agency such as the Commission then would be bound by the arbitrators' decision would depend on results of the arbitration, including, among other things, whether the issues resolved involved ordinary contract questions or other matters that could call for application of an agency's special expertise. In any event, that issue was not before the court below, nor could it say, in advance, that arbitration would be meaningless. Such interpretation of an arbitration provision renders it a nullity, a result not intended by the parties, and in conflict with Commission approval of a contract and with the Arbitration Act, as construed by this Court and other Courts of Appeals.

Proper administration of the Natural Gas Act and its relation to the Federal Arbitration Act require resolution of these conflicts. This case thus presents major federal questions which should be reviewed and resolved by this Court.

II. The Decision As To Commission Power To Order "Refunds" or "Damages" Is In Conflict With This Court's Constructions of Sections 4 and 7 of the Natural Gas Act; Is In Conflict With Constructions of Section 16 of That Act by Other Courts of Appeals; and Is A Misconstruction of the Act Generally Applicable To Regulated Natural Gas Companies That Should Be Reviewed By this Court

The Court of Appeals affirmed Commission orders requiring payments exceeding $100,000,000 in principal and interest, variously styled "refunds," "damages," or "compensation," which have no statutory basis.[16] In so holding, the court has construed the Natural Gas Act in a manner conflicting with this Court's constructions of Sections 4 and 7 of that Act and other Courts of Appeals' constructions of Section 16 of that Act.

The court concluded that Commission authority to enforce delivery obligations under a certificate issued under Section 7(c) is accompanied by substantive authority under Section 16 to order "refunds" as "compensation" for delivery deficiencies even though the certificate holder must make up those deficiencies, has collected no amounts subject to refund, and has charged, at all times, only the rates on file and effective under Section 4 of the Act. Such unprecedented construction of the Act can be applied to thousands of certificates issued to natural gas producers and pipelines under Section 7(c), would enlarge Commission "powers" to order "refunds" or "damages," and thus presents major issues in administration of the Act warranting full review by this Court:

1. The Court of Appeals' holding is in conflict with this Court's decision as to limitations on Commission authority to order "refunds" or other monetary payments under the Natural Gas Act.

Under Section 4, the filing of a rate schedule and changes of rates establishes effective, "filed rates" as the basis for charges and liabilities of the regulated company which are not subject to collateral change or retroactive modification. *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company*, 341 U.S. 246 (1951); *Hope Natural Gas Company* v. *Federal Power Commis-*

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[16] At the time of its decision, the Commission estimated that the principal amount of the "refunds" by Gulf would be $89,600,000 and imposed requirements for payment of interest of 7% and 9% for specific past periods. In a report filed with the Commission on December 15, 1976, Gulf estimated that the total amounts through October 31, 1976 would exceed $100,000,000 in principal and interest.

sion, 134 F.2d 287 (4th Cir. 1943), rev'd. on other grds., *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944). While the Commission may suspend a change of rates under Section 4 and, after decision, order refund of amounts collected subject to refund, the Commission cannot change effective, unsuspended rates retroactively and has no authority to order "reparations" as to past periods covered by such filed, effective rates. *Federal Power Commission* v. *Hope Natural Gas Company, supra; State Corporation Commission of Kansas* v. *Federal Power Commission*, 215 F.2d 176 (8th Cir. 1954).

The Court of Appeals apparently recognized that as to the past periods covered by the "refund" order in this case, Gulf had in effect, at all times, filed, effective rates under Section 4 so controlling its rights and liabilities under the Act and had collected no amounts subject to refund. However, the court failed to attempt to reconcile the conflict between the Commission order directing "refunds" as to past periods and the "filed rate" doctrine under Section 4 and prohibitions upon Commission action changing rates retroactively or ordering "reparations," as expressed in the opinions of this Court.

Similarly, Commission power to order "refunds" under Section 7(c) has been limited to amounts actually collected under temporary authorizations or "conditions" as to interim rates expressed in permanent certificates issued under that section. *United Gas Improvement Company* v. *Callery Properties*, 382 U.S. 223 (1965). In the absence of such "conditions," the filed, effective rate under Section 4 controls the monetary payments by or to the regulated company and cannot be modified collaterally or retroactively under Section 7. *Federal Power Commission* v. *Sunray DX Oil Company*, 391 U.S. 9, 23-24 (1968). Commission enforcement of "delivery obligations" under permanent certificates issued under Section 7(c) thus

must be by means of orders directing deliveries, and, if necessary, proceedings for judicial enforcement of such orders as to deliveries under Sections 20 and 22 of the Act. See *United Gas Pipe Line Company* v. *Federal Power Commission*, 385 U.S. 83 (1966); *J. M. Huber Corporation* v. *Federal Power Commission*, 236 F.2d 550 (3rd Cir. 1956).

Neither Section 7(c) nor any other section of the Act contains language empowering the Commission to accompany an order under Section 7(c) directing current and future compliance with a certificate with awards by it of "refunds" or "damages" for both past and future periods in derogation of an unconditioned permanent certificate issued under Section 7(c) and of filed, effective rates under Section 4. The sections of the Commission's orders directing payment of "refunds" as a purported and newly discovered "remedy" for deficiencies in deliveries under a certificate issued under Section 7(c) thus are beyond the scope of enforcement powers available to the agency itself. At the same time, those orders and any payments thereunder are in derogation of and in conflict with a permanent certificate issued under Section 7(c) without "conditions" as to refundable amounts and with the filed, effective rates under Section 4.

The Court of Appeals has failed to consider the collision between such novel, unprecedented orders and settled constructions of Sections 4 and 7. Its conclusion conflicts with this Court's constructions of Sections 4 and 7, recognizing the statutory limitations upon the agency's authority to order such payments, whether labelled "refunds," "damages," or something else.[17]

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[17] The difficulty below with finding lawful authority for the Commission's invalid "refund" order is illustrated by the varying labels used, such as "refunds," "damages," "compensation," and "performance bond." (*cf.* Appendix A, p. 37a; Appendix D, pp. 80a, 82a, 91a).

2. The Court of Appeals recognizes that its conclusions as to Commission authority under Section 16 of the Act are in conflict with constructions of Section 16 by other Courts of Appeals (Appendix A, pp. 36a, 37a).

Section 16 of the Act, typical of statutory provisions for agency "house-keeping," empowers the Commission to perform acts and issue orders "necessary or appropriate to carry out the provisions" of the Act. 15 U.S.C. § 717o. As construed in *Mobil Oil Corporation* v. *Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973), Section 16 does not enlarge substantive powers set out in other sections of the Act. Section 16 and the analogous provision of the Federal Power Act thus are construed to provide the Commission power to implement authority *otherwise* conferred by the statutes;[18] and, as this Court has held, Section 16 "does not authorize the Commission to set at naught an explicit provision of the Act." *Federal Power Commission* v. *Texaco Inc.*, 417 U.S. 380, 394 (1974).

Despite these constructions, the Court of Appeals chose to follow conflicting, expansive reading of Section 16 in *Mesa Petroleum Corporation* v. *Federal Power Commission*, 441 F.2d 182 (5th Cir. 1971). The court recognized that *Mesa*, unlike this case, involved an unauthorized "abandonment" under Section 7(b) of the Act and termination of deliveries (Appendix A, pp. 31a-37a); but reasoned erroneously that Gulf had "terminated part of its

[18] See *Mobil, supra*, and *New England Power Company* v. *Federal Power Commission*, 467 F.2d 425, 426 (D.C. Cir. 1972), aff'd, 415 U.S. 345 (1974); *City of Chicago* v. *Federal Power Commission*, 458 F.2d 731 (D.C. Cir. 1971), *cert. den.* 405 U.S. 1074 (1972); *Murphy Oil Corporation* v. *Federal Power Commission*, 431 F.2d 805, 810 (8th Cir. 1970). As stated in *Murphy*: "In certain situations, such as the one in Mississippi River Fuel Corp. v. Federal Power Commission, 108 U.S. App. D.C. 284, 281 F.2d 919 (1960), hereafter discussed, the Commission can utilize § 16 authority to effectuate its orders lawfully entered, but § 16 is not an enlargement of the specific authority granted the Commission under §§ 4, 5, and 7 of the Act." (431 F.2d at 810).

certificated service" under Section 7(c), and that the Commission therefore had "discretion" to fashion a "remedy" of monetary payments. Since Section 7(c) provided no basis for such an order, the court found such substantive authority in Section 16, despite recognition that "the interpretations of Section 16 in *Mesa* and *Mobil Oil* are irreconcilable" (Appendix A, p. 37a).

The Court of Appeals thus has read Section 16 in a manner conflicting with the recent, controlling constructions by the District of Columbia and Eighth Circuits in *Mobil*, *Murphy*, and other cases[19] and with this Court's cautionary language as to expansive reading of Section 16 in *Federal Power Commission* v. *Texaco Inc.*, *supra*. Under Sections 7(c), 20, and 22 of the Act, Congress specified the means and procedures for Commission enforcement of delivery "obligations" under Commission certificate orders. There was and is no "necessary" or "appropriate" reason to enlarge Commission "refund" powers in a manner conflicting with Section 4 of the Act; but if this expansive construction of Section 16 by the court below should stand, the Commission may proceed without regard to its defined powers and functions under Sections 4 and 7 and to the role of the courts contemplated by Congress in Sections 20 and 22.

The conflict in constructions of Section 16 by the Courts of Appeals as to the scope of agency "remedial powers" thus must be resolved by this Court.

3. The general shortage of natural gas and resultant curtailments and reductions in deliveries have caused increasing litigation over Commission authority and liabili-

[19] *Mobil Oil Corporation* v. *Federal Power Commission, supra; Murphy Oil Corporation* v. *Federal Power Commission, supra; Texaco Inc.* v. *Federal Power Commission*, 474 F.2d 416, 420 (D.C. Cir. 1972), vacated and remanded, 417 U.S. 380 (1974); *American Smelting & Refining Company* v. *Federal Power Commission*, 494 F.2d 925, 933 (D.C. Cir.), *cert. den.*, 419 U.S. 882 (1974).

ties of a regulated "natural-gas company" for alleged violations of certificate obligations, contracts, service agreements and for "damages" for underdeliveries.[20] In these cases, the courts generally have deferred to Commission jurisdiction over the volumetric conditions of service and curtailment plans, but issues of Commission jurisdiction to order "damages" for alleged "underdeliveries" have been unresolved. While the decision below applies to a producer certificate, the constructions of Sections 7(c) and Section 16 of the Act are, by their terms, applicable to any certificated sale and any Commission assertion of substantive powers under Section 16 to fashion monetary remedies in the form of "refunds" or "damages" upon a finding that underdeliveries violate a certificated agreement.

The importance of these issues and of the conflict between the circuits as to Commission substantive authority under Section 16 thus extends beyond the present case. In a time of shortage, compliance by pipelines and producers with certificates issued under Section 7 increasingly is drawn into question; demands for "remedies" for delivery deficiencies increase; and urgency for authoritative decision as to Commission "remedial" powers by way of monetary awards mounts. The conflict in circuits as to construction of Section 16, correctly perceived below, and the questions of Commission powers under Section 7(c) raise issues of major importance in the administration of the Natural Gas Act which should be reviewed and resolved by this Court.

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[20] See *Monsanto Company* v. *Federal Power Commission*, 436 F.2d 799 (D.C. Cir. 1972); *International Paper Company* v. *Federal Power Commission*, 476 F.2d 121 (5th Cir. 1973); *Atlanta Gas Light Company* v. *Federal Power Commission*, 476 F.2d 142 (5th Cir. 1973); *State of Louisiana* v. *Federal Power Commission*, 503 F.2d 844 (5th Cir. 1974); *Mississippi Public Service Commission* v. *Federal Power Commission*, 522 F.2d 1345 (5th Cir. 1975), *cert. den.*, 429 U.S. 870 (1976).

III. The Decision As To A Producer's Daily Delivery Obligations Raises A Question of General Importance Under the Act and Will Adversely Affect Current and Future High-Priority Natural Gas Consumers

While expressed by reference to language in the Gulf contract, the decision below as to a natural gas producer's daily delivery obligations has an impact beyond this case and, if not reversed, will cause accelerated depletion of currently proven natural gas reserves, to the detriment of high-priority consumers, such as those in the Eastern states dependent upon the Texas Eastern system.

"Swing" provisions in long-term producer contract executed in the 1960s and early 1970s are not uncommon. In rulemaking proceedings for almost a decade, the Commission indicated a policy preference for such provisions under which (1) a daily contract quantity (DCQ) is fixed and modified from time to time on the basis of deliverability of the producer's reserves; (2) a lower quantity, such as 80% of that DCQ, establishes a minimum "take-or-pay" obligation of the pipeline purchaser, frequently applied on an annual basis; and (3) a higher quantity, such as 125% of the DCQ, establishes the producer's maximum delivery obligation on any one day.[21] Such provisions contemplate "swing" in the producer's

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[21] The Commission's proposed rules and policy statements as to such clauses appeared in *Contracts Between Independent Producers and Interstate Natural Gas Companies Containing Certain Provisions in Daily-Contract-Quantity and Take-Or-Pay-For Clauses*, "Non-Acceptability" (Notice Issued May 22, 1961, FPC Docket No. R-199), 26 Fed. Reg. 4615 (1961); *Independent Producers and Interstate Natural Gas Companies*, "Nonacceptability of Contracts Containing Certain Provisions in Daily-Contract-Quantity and Take-or-Pay-for Clauses" (Notice Issued March 16, 1965, FPC Docket No. R-199), 30 Fed. Reg. 3175 (1965); and *Limitation on Provisions in Natural Gas Rate Schedules Relating to Minimum Take Provisions*, "Notice of Proposed Rulemaking" (Notice Issued September 23, 1970, FPC Docket No. R-400), 35 Fed. Reg. 15163 (1970).

daily deliveries, with the DCQ providing the basis for annual total deliveries, and with the "maximum" quantity available primarily for "peak" demands on the pipeline system, such as occurs in cold weather.[22]

Although the Commission did not adopt a rule mandating such provisions, its proposed rules were pending in 1963, and its policy preferences were published and well-known. The "swing" provision in the Gulf-Texas Eastern contract thus was written in this context and was so reviewed and analyzed in the 1963 Commission Staff Memorandum which was not made available to Gulf until the eve of oral argument in the Court of Appeals. Indeed, in the Commission's 1963 order issuing certificates to Gulf and Texas Eastern, the Commission noted Texas Eastern's intention to take quantities exceeding the DCQ ". . . on a peak day from this source of supply" (I App. 56).

The Court of Appeals failed to consider any of these relevant materials reflecting such industry practice and Commission statements, refusing even to remand to permit reconsideration in light of the long-sought 1963 Staff Memorandum demonstrating errors in the current Commission interpretation of a "swing" provision. Instead, the Court of Appeals referred only to language in a few sections of the contract divorced from the context in which it was drawn, the relevant industry and regulatory conditions, and the operations contemplated. Yet, the court found this to be a "close question" and was "disturbed" by failure of the Commission to reconcile the "Daily Contract Quantity" and "swing" provision with

[22] See, Rebman, "Drafting Natural Gas Sales Contracts—The Producer-Seller's View," 19 *Rocky Mt. Min. L. Rev.* 205, 227 (1974); Gregg, "Negotiating and Drafting Gas Purchase Contracts on Behalf of the Seller," 13 *Oil & Gas Inst.* 87, 118-119 (1962); Howell, "Natural Gas Purchase Contracts," 5 *Rocky Mt. Min. L. Rev.* 221, 256 (1960); Williams and Myers, "Swing," *Manual of Oil and Gas Terms* 586 (4th ed. 1976).

an order that would compel Gulf to deliver, day in and day out, the maximum quantity once intended to be a "peaking" source during colder weather and high demands on a pipeline system (*cf.* Appendix A, pp. 9a-10a; 11a).

Compliance with such an order obviously will shorten the contemplated term of the Gulf-Texas Eastern contract and will accelerate depletion of presently proven natural gas reserves. If daily deliveries must be sustained at the peaking quantity of 625,000 Mcf per day instead of an annual average of the DCQ of 500,000 Mcf, exhaustion of available reserves will occur earlier, and long-term stability of this major supply source for Texas Eastern's system will be shortened dramatically. Yet, such considerations were ignored below, even in discussion of "obligations" under a certificate issued under the "present and future public convenience and necessity" standard of Section 7(c) of the Act.

Such elimination of "swing" provisions has implications extending beyond this one producer contract because of use of the concept in pipeline-producer operations and other long-term contracts. The general shortage of natural gas has resulted in Commission rulemaking proceedings seeking to clarify producers' delivery obligations under existing and new producer certificates[23] and in general investigations as to contract delivery obligations and producer performance, particularly in the offshore area.[24] Inevitably, the holding in this case, which is tantamount to converting a maximum or peaking

[23] To date, the Commission has adopted in its Order No. 539-B what it termed a "prudent operator standard" to assess performance, but the rule is on review, *sub nom. Shell Oil Company* v. *Federal Power Commission*, Nos. 76-3066, *et al.* 5th Circuit.

[24] *E.g., Certain Producer and Pipeline Respondents*, FPC Docket No. RI75-112, now pending before an Administrative Law Judge after extensive formal hearings.

quantity into a daily delivery obligation, can carry over to these other proceedings, even for contracts not including "warranty" language.[25] The result is a direct conflict between such constructions of producers' contracts and efforts to conserve proven reserves and to husband natural gas for both current and future high-priority consumers. Under the holding in this case, production in the immediate future must be accelerated primarily to benefit low-priority users without regard, as here, for availability of supplies in the 1980-1990 decade.

These implications require review of a "swing" provision and a producer's daily delivery obligations in the context of impact and of industry practice, including documents such as the long-sought 1963 FPC Staff Memorandum finally made available in this case under the Freedom of Information Act in June, 1977. The questions obviously are of importance to Gulf and to Texas Eastern's system for which Gulf is a major producer supplier, but the implications in administration of the Act and for interstate consumers extend far beyond an ordinary question of contract construction. Therefore, the erroneous excision of the "swing" concept and conversion of a "peaking" volume into a daily delivery obligation also present questions warranting review by this Court.

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[25] Counsel for the State of North Carolina already has urged such an application of the Commission holdings in this case to producers supplying Transcontinental Gas Pipe Line Corporation. See, "Brief on Exceptions for State of North Carolina and North Carolina Utilities Commission," filed August 5, 1977, in proceedings styled *Transcontinental Gas Pipe Line Corporation (Investigation of Curtailment Levels)*, Docket No. RP75-51.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Note: Volume Nos. I, II, and III of the Joint Appendix prepared for the lower court have been filed with the Clerk of the Supreme Court in conjunction with these Appendices to the Petition for Writ of Certiorari.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2596

GULF OIL CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent

PHILADELPHIA GAS WORKS, TEXAS EASTERN TRANSMISSION CORPORATION, MILTON CLARK, FREDERICK W. ROSE, AND ST. REGIS APARTMENT, LTD., on behalf of themselves and all others similarly situated (PGW's customers), WASHINGTON URBAN LEAGUE, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY, MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES, RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS, RHODE ISLAND ATTORNEY GENERAL AND RHODE ISLAND CUSTOMERS' COUNCIL (New England), PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE BROOKLYN UNION GAS COMPANY, PHILADELPHIA ELECTRIC COMPANY,

Intervenors

No. 77-1050

CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY, MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES, RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS, RHODE ISLAND ATTORNEY GENERAL, AND RHODE ISLAND CONSUMERS' COUNCIL,

Petitioners

v.

FEDERAL POWER COMMISSION,

Respondent

PHILADELPHIA GAS WORKS, GULF OIL CORPORATION, BAY STATE GAS COMPANY, BOSTON GAS COMPANY, BRISTOL AND WARREN GAS COMPANY, CAPE COD GAS COMPANY, COMMONWEALTH GAS COMPANY, THE CONNECTICUT GAS COMPANY, CONNECTICUT NATURAL GAS CORPORATION, FALL RIVER GAS COMPANY, THE HARTFORD ELECTRIC LIGHT COMPANY, TOWN OF MIDDLEBOROUGH, MUNICIPAL GAS AND ELECTRIC DEPARTMENT, NEW BEDFORD GAS AND EDISON LIGHT COMPANY, NORTH ATTLEBORO GAS COMPANY, CITY OF NORWICH, DEPARTMENT OF PUBLIC UTILITIES, PEQUOT GAS COMPANY, PROVIDENCE GAS COMPANY, SOUTH COUNTY GAS COMPANY, THE SOUTHERN CONNECTICUT GAS COMPANY, TIVERTON GAS COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, MILTON CLARK, FREDERICK W. ROSE AND ST. REGIS APARTMENTS, LTD. (PGW's customers), ALGONQUIN GAS TRANSMISSION COMPANY, PHILADELPHIA ELECTRIC COMPANY,

Intervenors

ON PETITIONS FOR REVIEW OF OPINIONS AND ORDERS OF THE FEDERAL POWER CMMISSION

Argued June 7, 1977

Before SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges*

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OPINION OF THE COURT

(Filed Sep. 7, 1977)

ROSENN, *Circuit Judge*

These petitions raise numerous questions concerning an order by the Federal Power Commission ("FPC") requiring Gulf Oil Corporation ("Gulf") to deliver to the pipelines of the Texas Eastern Transmission Company ("Texas Eastern") large quantities of natural gas. Gulf urges that the FPC order be set aside, several New England states ("New England")[1] ask that the order be modified, and a group of intervenors[2] argue that the

[1] The petitioners in No. 77-1050 are the Connecticut Public Utilities Control Authority, the Massachusetts Department of Public Utilities, the Attorney General of Rhode Island, the Rhode Island Division of Public Utilities and Carriers, and the Rhode Island Consumers' Council. Gulf Oil Corporation is an intervenor in No. 77-1050.

[2] The intervenors in No. 76-2596 are the Washington Urban League, the Texas Eastern Transmission Co., Brooklyn Union Gas Co., Public Service Electric and Gas Co., the Public Service Commission of New York, Philadelphia Gas Works, Customers of Philadelphia Gas Works, and the several New England entities who are petitioners in No. 77-1050.

Commission's order should be enforced in full. Finding no merit in either Gulf's or New England's petition, we affirm the Commission's order without modification.

I. *Background*

This dispute grows out of a certificate of public convenience and necessity issued to Gulf by the FPC in 1964. That certificate followed a 1963 "Precedent Agreement" between Gulf and Texas Eastern wherein they agreed to enter into a "Gas Purchase Contract" upon the receipt by each of an appropriate certificate from the FPC.

Upon issuance of the certificates, Gulf commenced performance in accordance with the terms of the contract and the certificate. Within a few years, however, Gulf discovered that it had vastly overestimated the reserves of its West Delta Block 27 Field located in Plaquemines Parish, Louisiana, the field from which Gulf had expected to draw most of the natural gas for the Texas Eastern contract. In 1971, citing the mistake in its reserve estimate, Gulf applied to the Commission for a certificate amendment increasing the price at which it supplied gas to Texas Eastern. In Opinion Nos. 692 and 692-A, issued in 1974, the FPC denied Gulf's application for an amendment and Gulf did not seek judicial review of the Commission's decision.

Since 1973, Gulf's deliveries to Texas Eastern have fallen short of Texas Eastern's demands and since 1974, short of the contract specified quantities. On November 7, 1975, the FPC issued the show cause order which initiated this proceeding. After a hearing, the Administrative Law Judge concluded that Gulf was obligated to deliver greater quantities of gas than it had been and he ordered certain performance and refunds on the part of Gulf. The Commission, in Opinion No. 780, agreed

with the conclusions of the Administrative Law Judge. Gulf and a number of other parties petitioned for rehearing but in Opinion No. 780-A the Commission held to its prior decision. This appeal followed.

On review, we are empowered to "affirm, modify, or set aside [the Commission's] order in whole or in part," Section 19(a) of the Natural Gas Act of 1938, 15 U.S.C. § 717r (1970). The scope of our review is defined by the Administrative Procedure Act, 5 U.S.C. § 706 (1970).[3]

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[3] Section 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

II. *Gulf's Delivery Obligations*

The firts question before us concerns the quantity of gas which Gulf is obligated to deliver. The Commission found that under the certificate of public convenience and necessity, Gulf is obligated to deliver 625,000 MCF (thousand cubic feet) of gas per day to Texas Eastern except when Texas Eastern demands less. Gulf maintains that its obligation, if any, is limited to 500,000 MCF per day.

Although our concern is with the meaning of the certificate, *see Sunray Mid-Contract Oil Co.* v. *FPC*, 364 U.S. 137, 152-54 (1960), it is to the Gulf-Texas Eastern contract that we must turn. The reason is that the certificate alone has little substance. At its core is the incorporation by reference of Gulf's application; the application in turn refers to the terms of the precedent agreement and the gas purchase contract. The scope of the certificate, therefore, is in large part defined by the terms of the contract.[4]

Several provisions of the contract are relevant to this issue. The first is Article II, ¶ 1(a), which provides that after a start-up period ending on November 1, 1968, the "Daily Contract Quantity" will be established at 500,000 MCF per day. The second relevant provision is Article I ("Scope of Agreement"), ¶ 4:

> Seller [Gulf] warrants and agrees that there will be provided under the terms of this Agreement a quantity of gas sufficient to enable Seller to have available for delivery hereunder on any day or days a volume not less than one-hundred twenty-five per cent (125%) of the Daily Contract Quantity. . . .

Article II ("Quantity of Gas") contains two additional provisions of importance. Under paragraph 1(b),

[4] Pertinent parts of the contract are reprinted as an appendix to this opinion. Individual paragraphs are quoted throughout the body of the opinion.

Texas Eastern agreed to purchase or pay for if available and not taken

> a quantity of gas equal to eighty per cent (80%) of the sum of [the] Daily Contract Quantity . . ., multiplied by the number of days in [the] year. . . .

Paragraph 1(c) gives Texas Eastern the right

> to purchase from Seller hereunder at any time, and from time to time, quantities of gas greater than the Daily Contract Quantity . . .; provided that Seller shall not be obligated to deliver in any day a quantity of gas in excess of one hundred twenty-five per cent (125%) of [the] Daily Contract Quantity.

Another relevant provision, Article XII states:

> This Agreement shall . . . remain in full force and effect for a term of twenty-six (26) years from the date of initial deliveries of gas hereunder, or to the date on which four billion four hundred thirty-seven million six hundred seventy-five thousand (4,437,675,000) MCF of gas . . . has been delivered to Buyer [,] whichever shall first occur.

Gulf insists that if these provisions of the contract are read together, it becomes clear that some sort of "swing" in deliveries is contemplated. In Gulf's view, Texas Eastern is entitled to receive and Gulf is obligated to provide no more than the Daily Contract Quantity ("DCQ")—500,000 MCF—except on those "infrequent days when customers create a peak demand on [Texas Eastern's] system." On days when Texas Eastern experiences a light demand, on the other hand, Texas Eastern need take no more than 80 percent of the DCQ. Thus, according to Gulf, the provisions of ¶ 1(b) and ¶ 1(c) of Article II are, in a sense, reciprocal—the contract contemplates that "swings" one way or another over the course of the contract will ultimately balance out so that the

delivery of the 4,437,675,000 MCF [5] (or 4.4 TCF) will be completed on or about the 26th anniversary of the Agreement. The conclusion which Gulf draws is that the contract does not entitle Texas Eastern to receive the full 125 percent of the DCQ—625,000 MCF—day after day on a regular basis.

The FPC responds to Gulf's argument by first noting that since 1973 Texas Eastern has consistently demanded delivery of 625,000 MCF every day. The Commission's view is that Gulf's obligation to deliver 125 percent of the DCQ is contingent on nothing but Texas Eastern's demand; once the demand is made, the obligation becomes operative.

In our own analysis of the contract, we find one important factor supporting Gulf's interpretation: the use of the term "Daily Contract Quantity." These three words standing alone imply that 500,000 MCF is the normal daily quantity of gas which Gulf must deliver and Texas Eastern is required to buy. Arrayed against this single factor, however, are other factors which militate against Gulf's theory. First is the unequivocal and unconditional warranty contained in Article I, "Scope of Agreement": "Seller warrants . . . to have available for delivery . . . *on any day or days* a volume not less than one hundred twenty-five percent . . . of the Daily Contract Quantity." (Emphasis supplied.) Moreover, if the 80 percent DCQ provision and the 125 percent DCQ provision were intended to be reciprocal, as Gulf contends, the mention of one without the other in the Scope of Agreement would be most unlikely.

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[5] The figure of 4,437,675,000 MCF represents the product of multiplying the number of days in a year (365 or 366) by 26 years and then multiplying this figure by the DCQ of 500,000 MCF with appropriate adjustments for the lower DCQ's during the start-up period.

We believe that Article II, "Quantity of Gas," lends further support to the Commission's interpretation. Nowhere in that Article is Gulf's daily obligation limited to the DCQ. On the contrary, the article speaks only of Texas Eastern's right to purchase "at any time, and from time to time" as much as 125 percent of the DCQ.

Another important consideration also militates against Gulf's contention that the contract established a "swing" in Gulf's gas delivery obligations rather than an absolute obligation to deliver 125 percent of the DCQ upon demand. Such a construction of the contract is unreasonable since it would render the parties' rights and obligations uncertain and indefinite. A contract should be construed, if possible, so as to sustain it rather than convert it into something vague and unenforceable and we will not strain the language of a vital provision of this contract to create an ambiguity where none exists. *See H. K. Porter Company* v. *Wire Rope Corp. of America, Inc.*, 367 F.2d 653 (8th Cir. 1966); *Ness* v. *National Indemnity Company of Nebraska*, 247 F.Supp. 944 (D.C. Alaska 1965).

We recognize that the question is close. We are particularly disturbed by the failure of the FPC and the intervenors to explain satisfactorily the use of the words "Daily Contract Quantity." Nevertheless, when we weigh that term against the other factors, particularly the warranty of 125 percent of the DCQ, we are persuaded that the Commission's interpretation is more harmonious with the contractual language than is the interpretation urged by Gulf. We therefore accept the Commission's interpretation and we will affirm the Commission's holding that Gulf is obligated to deliver 625,000 MCF every day unless Texas Eastern demands less until the contract expires.[6]

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[6] Gulf's reference in its 1971 petition to amend the certificate to "maximum required deliveries of 625 million cublic feet per day"

III. *Arbitration*

On November 20, 1975, two weeks after the Commission issued the show cause order, Gulf by letter to Texas Eastern invoked the arbitration clause of the agreement:

> Any dispute arising between Seller and Buyer out of this Agreement shall be determined by a board of three arbitrators to be selected for each such controversy so arising . . . . Such board shall determine the matters submitted to it pursuant to the provisions of this Agreement. The action of a majority of the members of such board shall govern and their decision in writing shall be final and binding on the parties hereto.

Gulf requested arbitration on the issue whether Gulf's delivery obligations were wholly or partially excused by (1) commercial impracticality, (2) mutual mistake, or (3) *force majeure*.[7] In the proceeding before the FPC, Gulf requested that the Commission reserve its rulings on these issues until it had received the decision of the arbitration board. Gulf now seeks review of the Commission's refusal to defer to the arbitrators.

Gulf's argument is that its certificate obligation is coextensive with its contractual obligation, that the extent of its contractual obligation is to be determined by arbitration, and, therefore, that the Commission cannot possibly decide whether Gulf is complying with its certificate

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casts considerable doubt on its present contention that the parties to the contract did not contemplate daily deliveries in that amount. We recognize, however, that neither the doctrine of *res judicata* nor that of collateral estoppel binds Gulf to the position which it formerly took. *See generally* 1B *Moore's Federal Practice* ¶ 0.441 at 3771 et seq. (1974 ed.).

[7] On January 13, 1976, Texas Eastern filed suit against Gulf in the United States District Court for the Southern District of Texas, Houston Division, to enjoin the arbitration. A motion for a preliminary injunction is now pending in that action.

until the arbitration board decides whether Gulf's performance is adequate under the contract. Gulf contends that the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1970),[8] evidences a strong Congressional policy favoring arbitration of contract disputes, *J.S.&H Construction Co.* v. *Richmond County Hospital Authority*, 473 F.2d 212 (5th Cir. 1973), and that regulatory agencies are not exempt from this policy. *William E. Arnold Co.* v. *Carpenters Dist. Council*, 417 U.S. 12, 16-17 (1974). In granting a certificate based on the contract, Gulf maintains, the Commission effectively gave its approval to the contract's arbitration clause. In Gulf's view, the Commission should not now be permitted to deny the validity of arbitration as the means for resolving contract disputes. We disagree with Gulf's analysis.

By its terms, the arbitration clause of the contract applies only to disputes "arising between Seller and Buyer out of this Agreement," whereas the instant case is a dispute betwen Gulf and the FPC arising out of the certificate. We discern no inconsistency in the Commission's approval of arbitration as a means of resolving disputes between Gulf and Texas Eastern and the Commission's refusal to defer to arbitration for the resolution of disputes between Gulf and the FPC.

Gulf's argument, in essence, is that since the scope of Gulf's certificate obligation is defined by the contract and the contract calls for questions of interpretation to be decided by arbitration, it follows that Gulf's obligation under the certificate is to be decided by arbitration. Although we accept the premises of this argument, our reading of the arbitration clause and the responsibilities

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[8] 9 U.S.C. § 2 provides that a "provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable and enforceable."

of the Commission under the Natural Gas Act do not allow us to agree with the conclusion.

The FPC is charged with the public responsibility to enforce the certificate, and in the performance of its duty, the Commission necessarily must resort to the terms of the contract. But this does not mean that the Commission becomes in any sense a party to the contract bound by the mutual obligations between the parties themselves. The reciprocal promises between Gulf and Texas Eastern to resolve their disputes by arbitration are inapplicable to the Commission's duty to enforce the certificate of public convenience.

We are not persuaded by the cases which Gulf cites as authority for the contrary conclusion.[9] Each of these cases involves the division of responsibility between a court and arbitrator where the parties had previously agreed to arbitrate the very dispute before the court. In contrast, the issue in the instant case is the interpretation of Gulf's public service obligation under its certificate, the interpretation of which can only be within the FPC's exclusive jurisdiction and which is not subject to arbitration. None of the cases cited by Gulf concerns the question whether a regulatory agency seeking to enforce a certificate issued by it must defer to arbitration merely because the certificate party has agreed in a sales contract with a customer to arbitrate disputes between them. Moreover, none involves a governmental agency which has an independent interest as a regulatory body in the enforcement of the terms of its certificate of public convenience.

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[9] *E.g.*, William E. Arnold Co. v. Carpenters District Council, 417 U.S. 12 (1974); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); J.S.&H. Const. Co. v. Richmond County Hospital Authority, 473 F.2d 212 (5th Cir. 1973).

The futility of the procedure which Gulf proposes also concerns us. Although Gulf claims the right to arbitrate the issues of contract interpretation, it does not contend that the results would in any sense be binding on the Commission. Gulf urges only that the Commission should not have decided this case without the benefit of the arbitrators' previous resolution of the same issues. We fail to see the purpose to be served, however, in a lengthy delay of FPC action in this urgent matter pending arbitration when the FPC, even under Gulf's view, would ultimately be free to ignore completely the arbitration results. Deferral to arbitration under these circumstances would unnecessarily expend precious time, effort, and money.

For these reasons, we will affirm the refusal of the FPC to defer to arbitration.

IV. *Commercial Impracticability*

Gulf contends that the contract is limited to the gas which it is commercially practicable to deliver. As part of this argument, Gulf insists that the contract as a whole evidences the intention of the parties to deal only with gas found in the southern Louisiana area in which Delta Block 27 is located. Gulf also maintains that even if its delivery obligations are unconditional on the face of the contract, the Commission's order that Gulf perform the contractual deliveries is erroneous under two principles of law:[10] (1) even facially unconditional obligations are

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[10] We reject Gulf's contention that the Commission's enforcement of its certificate of public convenience is subject to the discretion of the court by analogy to the equitable principles dealing with specific performance. Each order to comply with a certificate is, in a sense, an order of specific performance, but that alone does not make it subject to the equitable discretion of the court. We may set aside the Commission's order only if it constitutes an abuse of discretion or otherwise fails to meet the standards of the Administrative Procedure Act, 5 U.S.C. § 706(2). The analogy to specific performance is of no help in making that determination.

subject to economic limitations; and (2) "[w]here performance has been rendered impracticable, even though not impossible, and such impracticability was the result of unforeseen events, as here, a party will be excused from performance."

The first question to be resolved is whether the contract itself limits the sources of gas to the southern Louisiana area. Gulf points to the specific reference in the preamble of the contract to southern Louisiana and to the provision in Article III that delivery will take place in Plaquemines Parish, Louisiana, close to Delta Block 27. Gulf's interpretation of the contract, however, is inconsistent with the single most important provision of the contract—the provision by which Gulf "warrants" the delivery of the contract quantities of gas without regard to service. The importance of this provision is underscored by the history of the contract. Thus, although Gulf could have dedicated to the contract the specific gas producing lease of West Delta Block 27, Gulf purposefully chose not to do so. As Gulf emphasized in its application for the certificate of public convenience,

> [T]he agreement with Texas Eastern does not commit or dedicate to the contract any specific gas producing leases or fields, and no specific commitment or dedication is intended.

Gulf itself reiterated its understanding of the contract in its 1971 application for an amendment to the certification:

> The Gas Purchase Contract is what is known as a warranty contract which does not involve the dedication of specific leases to the performance of the agreement but warrants delivery of a stated volume at a specified rate per day.

Furthermore, the FPC's finding and order accompanying the issuance of the certificate require that we not interpret the contract as limited to gas from West Delta

Block 27. The Commission, although recognizing that Gulf expected to draw most of the gas from Delta Block 27, noted that "Gulf further indicated that it had additional gas available to fulfill the overall contractual requirement." By accepting the certificate which was based on this finding, Gulf became bound by the Commission's interpretation. *Cf. Sunray Mid-Continent Oil Co.* v. *FPC*, *supra*, 364 U.S. at 156; *Atlantic Refining Co. PSC of New York*, 360 U.S. 378, 389 (1959).

Against this overwhelming evidence that Gulf intended to *warrant* the deliveries of contract quantities without regard to source and that the certificate is predicated on that warranty, Gulf relies only upon the reference in the preamble to southern Louisiana and the delivery point provision of Article III. In our view, these references are a slender reed on which to rest and neither they nor other aspects of the contract support Gulf's position.

First, a recital in a preamble, although part of the contract, must give way in case of conflict with the operative provisions of a contract. *Fidelity Bank* v. *Lutheran Mutual Life Ins. Co.*, 465 F.2d 211, 214 (10th Cir. 1972); *Kogod* v. *Stanley Co. of America*, 186 F.2d 763, 765 (D.C. cir. 1950). Thus, although we perceive no conflict between the recital of gas reserves in southern Louisiana and the warranty of deliveries regardless of source, a conflict, if any, must be resolved in favor of the warranty. Secondly, the provision for delivery at a point near the area from which Gulf concededly anticipated it would draw most of the gas is hardly very remarkable and proves very little. Even without the warranty provision, we would not interpret language which purports to do no more than establish a delivery point as actually creating an implied condition on the seller's entire obligation to perform. In the context of this warranty contract, of course, such an interpretation is impossible. We conclude, therefore, that the contract on its fact obligates

Gulf to deliver the specified contract quantities of gas regardless of where the gas is drawn.

The next question is whether Gulf's delivery obligation, although unconditional on the face of the contract, is subject to economic limitations. Gulf cites *Dillon* v. *United States*, 156 F.Supp. 719, 722 (Ct. Cl. 1975), holding that contract to deliver hay at Ft. Reno, Oklahoma, which the parties contemplated would be grown in nearby Vinita, Oklahoma, did not obligate the seller to purchase hay in Nebraska and ship it to Oklahoma at his expense, and *Mitchell Canaries, Inc.* v. *United States*, 77 F.Supp. 498, 502 (Ct. Cl. 1948), reaching a similar result with respect to blackberries not available where contemplated due to a crop failure.

Reliance on these cases is misplaced for three reasons: First, and most important, neither case involves a warranty contract. Second, in both cases the sellers were relieved of their delivery obligation only upon a showing of extreme hardship, whereas Gulf has shown no particular hardship at all in the instant case, as we discuss below. Third, in both *Dillon* and *Mitchell Canaries*, the extreme economic hardship to the sellers resulted from forces of nature clearly beyond the sellers' control, not an error on the part of the sellers in estimating their supplies. We, therefore, do not believe that Gulf's obligation can be excused by analogy to either *Dillon* or *Mitchell Canaries*.

Finally, we turn to Gulf's argument that its performance is excused by the doctrine of commercial impracticality. In support of this contention, Gulf cites a number of cases which hold that if, due to unforeseen circumstances, the cost of performance of a contract becomes so excessive and unreasonable as to make performance impracticable, performance may be excused. *See, e.g., Mineral Park Land Co.* v. *Howard*, 172 Cal. 289, 156 P. 458

(1916); *Cosden Oil & Gas Co.* v. *Moss*, 1313 Okla. 49, 267 P. 855 (1928); *Corozza* v. *Williams*, 190 Md. 143, 57 A.2d 782 (Ct. App. 1948). Relying on these authorities, Gulf asserts that "[N]o one entertained the thought that Gulf would be required to deliver gas from far off places at unknown but obviously 'exhorbitant' costs." We do not dispute Gulf's statement of the legal doctrine, only its application to this case.

We believe, first of all, that a warranty by its very nature precludes relief on a theory of commercial impracticability resulting from the unavailability of gas.

> In essence a warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself. Thus, a warranty amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue.

Paccon, Inc. v. *United States*, 399 F.2d 162, 166-67 (Ct. Cl. 1968), *quoting Dale Constr. Co.* v. *United States*, 168 Ct. Cl. 692, 699 (1964). *Accord, Metropolitan Coal Co.* v. *Howard*, 155 F.2d 780, 784 (2d Cir. 1946) (L. Hand, J.); *The Fred Smartley, Jr.*, 108 F.2d 603, 606-07 (4th Cir. 1940). Gulf's warranty "that there will be provided . . . a quantity of gas sufficient to enable Seller to have available for delivery [the contract quantities of gas]" whether it is a warranty of fact or of performance, is subject to the same rule: By warranting, rather than merely promising, the availability of sufficient quantities of gas, Gulf assumed for itself the entire risk that future conditions would raise the cost of gas. As the Restatement says,

> Since it is possible for a party to contract to assume the risk of every chance occurrence, a fair interpre-

> tation of a contract may indicate an intention to be bound to perform or to pay damages for nonperformance whatever contingencies occur.

Restatement of Contracts, § 288, comment b at 427 (1932). Gulf's warranty indicates just such an intention to be bound. The defense of impracticability is inconsistent with an express warranty. *Chemetron Corp.* v. *McLouth Steel Corp.*, 381 F.Supp. 245, 257 (N.D. Ill. 1974), *aff'd* 522 F.2d 469 (7th Cir. 1975); *cf. United States* v. *Hathaway*, 242 F.2d 897, 899-901 (9th Cir. 1957), and Gulf may not avoid its obligations because one of the risks which it assumed has now become real.

We also believe that even in the absence of an express and unconditional warranty, the doctrine of commercial impracticability would not apply to this case. The crucial question in applying that doctrine to any given situation is whether the cost of performance has in fact become so excessive and unreasonable that the failure to excuse performance would result in grave injustice:

> We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them.

Mineral Park Land Co., supra, 172 Cal. at ——, 156 P. at 460. The party seeking to excuse his performance must not only show that he can perform only at a loss but also that the loss will be especially severe and unreasonable. *See American Trading & Production Corp.* v. *Shell Int'l Marine Ltd.*, 453 F.2d 939, 942 (1972); Uniform Commercial Code § 2-615, Comment 4. Gulf has made no such showing.

While repeatedly asserting that the cost of delivering the contract quantities of gas would be "exorbitant,"

Gulf's briefs are curiously devoid of citation to supporting evidence in the record. Nor have we been able to discover any such evidence ourselves. What we do find in the record is an uncontradicted Price-Waterhouse Report commissioned by Gulf for Gulf's confidential use which projects a net *profit* to Gulf of $190,000,000 on the Texas Eastern Contract even if Gulf is required to fulfill its warranty obligations. At the very least, the evidence in the record suggests that although Gulf may realize smaller profits than originally anticipated, it will probably suffer no loss, and certainly not a severe and devastating loss. The commercial impracticability doctrine is thus completely inapplicable to the instant case. We find no error in the FPC's decision on this issue.[11]

V. *Mistake*

Gulf contends that it is entitled to partial relief from its delivery obligations on the basis of the mistake it made in estimating the gas reserves of Delta Block 27. Gulf evidently relies on the well known doctrine that a mutual mistake as to a material fact will relieve a party to a contract of his obligation to perform.[12] We agree with the Commission that Gulf is entitled to no relief on this ground.

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[11] We find it unnecessary to consider the Commission's contention that performance of a Natural Gas Act certificate obligation can be excused only upon a showing that performance would impair the certificate holder's overall financial integrity. *Cf.* Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968); FPC v. Sierra Pacific Power Co., 350 U.S. 348, 350 (1956).

[12] *See, e.g.*, Restatement of Contract, § 502 (1932):

> [W]here parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be . . . .

We must stress once again that the contract here at issue contains an express and unconditional warranty. For reasons best known to Gulf itself, Gulf chose not to base this contract on the actual reserves of Delta Block 27 by dedicating its gas leasehold for that field to this contract.[13] Instead, Gulf *warranted* the availability of the contract quantities of gas in the expectation of obtaining the bulk of it from Delta Block 27 despite the inherent uncertainty of the quantities ultimately available in the Block.[14] We believe that the existence of a warranty as to the availability of gas completely forecloses equitable relief based on a mistake as to the availability of gas.

The warranty in this case is analogous to a warranty deed. As Professor Corbin says, "A seller of land or goods who conveys by warranty deed, or who otherwise expressly warrants title or quality or condition, does not escape from his warrant by proving that he reasonably believed that defects did not exist. Even though he was not conscious that there was risk, he was at least aware of the extent of his express warranty." 3 Corbin on Contracts § 598 at 591-92 (1960) (footnote omitted). *Accord*, 6 S. Williston and G. Thompson, Williston on Contracts § 1934 at 5417 (rev. ed. 1938).[15] Having war-

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[13] According to Gulf's witness, Dr. Walter Shellshear, Gulf preferred to enter into a warranty contract rather than into the usual contract of dedication of a specific gas field because it "did not want to reveal any of its confidential geological information . . . ."

[14] *Cf.* Hatt v. Walker, 33 S.W. 2d 489, 499 (Tex. Civ. App. 1930), holding that it is "a matter of fact of which courts will take judicial notice that the existence of or the duration of the existence of petroleum within the limits of a particular tract of land is uncertain."

[15] *See also* Trans World Airlines, Inc. v. Skyline Air Parts, Inc., 193 A.2d 72 (D.C. Ct. App. 1963), holding that a party who makes a binding contract to sell goods which he has already sold to another is not excused from performance by virtue of his unilateral, negligent mistake.

[Footnote continued on page 23a]

ranted the availability of 625,000 MCF of natural gas per day, Gulf may not now assert a defense of mistake.[16] We will affirm the Commission's decision on this issue.

VI. *Force Majeure*

Gulf argues that it is excused from delivery of the full 625,000 MCF per day under the terms of the *force majeure* clause of the contract. In Gulf's view, the failure of the Department of Interior to hold more than two general offshore Louisiana lease sales between 1962 and 1972 constituted an act of *force majeure* within the meaning of the contract. Specifically, Gulf points to this language in the *force majeure* clause:

> [The term "force majeure"] shall . . . include (a) in those instances where either party hereto is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations hereunder, the inability of such party to acquire . . . at reasonable cost and after the exercise of reasonable diligence, such servitudes, rights of way grants, permits or licenses . . . .

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[15] [Continued]

The same result obtains under Article 2 of the Uniform Commercial Code, which we assume is applicable to the Gulf-Texas Eastern contract. *Cf., e.g.*, Amoco Pipeline Co. v. Admiral Crude Oil Corp., 490 F.2d 114 (10th Cir. 1974); Oskey Gasoline & Oil Co. v. OKC Refining Inc., 364 F.Supp. 1137 (D. Minn. 1973). An express warranty under U.C.C. § 2-313 may extend to the *quantity* of goods to be sold. *See, e.g.*, A.A. Baxter Corp. v. Colt Industries, Inc., 88 Cal. Rpts. 842, 847, 10 Cal. 3d 144 (1970).

[16] The Commission and various intervenors suggest a number of other reasons why Gulf's defense of mistake is without merit—that the mistake was not mutual, that a mistaken prediction as to a future fact known to be uncertain cannot relieve a party of his contractual obligations, and that the mistake as to Delta Block 27 was not even material in view of Gulf's partial reliance on other gas reserves. We need not pass on any of these questions.

Gulf contends that because an offshore gas lease is a "servitude" under Louisiana law, *State ex rel. Bush* v. *United Gas Public Service Co.*, 185 La. 496, 169 So. 523 (1936); *Arent* v. *Hunter*, 171 La. 1059, 133 So. 157 (1931), Gulf's inability to acquire offshore leases falls within this definition of *force majeuer*.

Alternatively, Gulf contends that even if the doctrine of *ejusdem generis* indicates that "servitudes," together with "rights of way grants, permits or licenses," is intended to refer only to easements necessary for construction of production or transportation facilities, the failure to sanction offshore leases comes within another part of the contract definition of *force majeure*: "any other causes, whether of the kind herein enumerated *or otherwise*, not within the control of the party claiming suspension." (Emphasis supplied.) Gulf's argument, however, requires that we completely ignore the determinative proviso of the *force majeure* clause:

> . . . provided, further, that in no event shall [the] term ["force majeure"] mean or include partial or entire failure or depletion of gas reserves or sources of supply of gas.

We must give effect to this specific provision rather than to the more general language on which Gulf relies. *See, e.g., Capitol Bus Lines Co.* v. *Blue Bird Coach Lines, Inc.*, 478 F.2d 556, 560 (3d Cir. 1973).

In an effort to avoid the clear exclusion from the *force majeure* clause of "failure . . . of gas reserves or sources of gas," Gulf argues in its reply brief that gas leases must first be acquired before they can "fail," and that it is the inability to acquire leases in the first place, not the failure of the leases, which forms the basis for Gulf's *force majeure* argument. Gulf's argument in this respect, however, is somewhat disingenuous. In every other part of its brief and at oral argument, Gulf

made clear that its alleged inability to perform its certificate obligation was attributable to Gulf's overestimate of the amount of gas in West Delta Block 27. It was the "partial or entire failure or depletion" of the Block 27 "reserves or sources of supply of gas" which led to do Gulf's under-deliveries. In its *force majeure* argument, on the other hand, Gulf discovers that it was its inability to acquire offshore leases rather than its mistaken estimate of the Block 27 reserves which brought about the reduced deliveries. The fact is, however, that Gulf's greatly increased need for offshore leases was brought about by the mistaken estimate of the Block 27 reserves, a mistake which is specifically excluded from the *force majeure* clause.

The clear inapplicability of the *force majeure* clause to the underdeliveries here is made even plainer when it is considered in the context of the entire contract. As we have discussed above, Gulf chose to warrant its delivery of the full contract quantity, rather than conditioning that delivery on the availability of sufficient gas reserves. The notion that the unavailability of gas could serve to excuse performance is inconsistent with the essence of a warranty contract and the *force majeure* clause cannot serve to excuse Gulf's breach of warranty. We will, therefore, affirm the FPC's determination that Gulf's performance of its certificate obligations was not excused in whole or in part by *force majeure* within the meaning of the contract.

VII. *Res Judicata*

Gulf next contends that the Commission's decisions in Opinions No. 780 and No. 780-A—the decisions which are now under review—are tainted by the Commission's unwarranted reliance on its prior decisions in Opinions No. 692 and No. 692-A. In Opinions Nos. 692 and 692-A, in response to Gulf's application for an amendment

to its certificate, the Commission determined that Gulf's delivery obligations were unconditional and not excused by commercial impracticability, mistake, or force majeure consisting of the Interior Department's failure to sanction offshore leases. Gulf took no appeal from the Commission's decision in Nos. 692 and 692-A.

Although Gulf characterizes the Commission's alleged recent reliance on Nos. 692 and 692-A as a misapplication of the doctrine of *res judicata*, we believe that Gulf is in fact referring to the doctrine of collateral estoppel. *Res judicata* applies only where a second suit or proceeding is brought on the same cause of action between the same parties or those in privity with them. The original judgment on the merits is conclusive not only as to matters actually raised but also as to matters which could have been raised and litigated. *Murphy* v. *Landsburg*, 490 F.2d 319, 322 (3d Cir. 1973). Collateral estoppel is more limited in its effect; collateral estoppel forecloses a party from relitigating the same question decided adversely to him by a prior judgment on another cause of action; the conclusive effect of the prior adjudication constitutes an estoppel only with respect to the identical issues actually litigated and necessary to support the initial judgment. *Donegal Steel Foundry Co.* v. *Accurate Products Company*, 516 F.2d 583 (3d Cir. 1975). Since Nos. 692 and 692-A involved an application by Gulf for a certificate amendment and the present proceedings concern a show cause order issued by the Commission to enforce Gulf's certificate obligations, we believe that collateral estoppel is the correct principle to be considered.

The first question presented by Gulf's collateral estoppel argument is whether the Commission's decision in the case now under review was in fact made in reliance on its prior decision in Nos. 692 and 692-A. New England, one of the intervenors, denies any such reliance

on the part of the Commission, but we disagree. In Opinion No. 780, the Commission said this:

> But we do not rest the present opinion and order in this show cause proceeding *solely* on statements in Opinions Nos. 692 and 692-A but on our reexamination of the contract and the record in this case.

(Emphasis supplied.) Opinion No. 780-A contains a substantially identical statement. In view of this language, we recognize that one basis for the Commission's conclusion was its prior determination. On the other hand, the opinions of the Administrative Law Judge and the Commission in the present proceeding, as well as the voluminous record which was assembled, demonstrate that the Commission did in fact both thoroughly reexamine the entire record and fully reconsider each of Gulf's arguments with respect to commercial impracticability, mistake, and force majeure. Thus, the Commission's determination on these issues rests on what are essentially alternative holdings, one based on giving collateral estoppel effect to Opinion No. 692 and 692-A and the other on a complete reconsideration on the merits in the instant case.

We have held in Parts IV, V and VI, *supra*, that Gulf's arguments on the issues of commercial impracticability, mistake, and force majeure are without merit. Even if Gulf is correct in its contention that the Commission's determination on these issues placed improper reliance on Opinion No. 692 and 692-A,[17] the existence

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[17] Gulf's argument rests heavily on Judge Maris' decision in Panhandle Eastern Pipe Lines v. FPC, 236 F.2d 289, 292 (3d Cir. 1956), and its contention that the Commissions' determination in Nos. 692 and 692-A as to Gulf's contractual obligations was not necessary to the result of that proceeding—i.e., the determination that an amendment of Gulf's certificate was not justified by public convenience or necessity. The Commission supports its use of

of an independent and meritorious ground in support of the Commission's decision renders harmless any error the Commission may have made in its application of the doctrine of collateral estoppel.

VIII. *Refunds*

The Commission ordered Gulf to refund to Texas Eastern for distribution to Texas Eastern's customers a sum equal to "the difference between Texas Eastern's requests for gas and Gulf's deliveries [multiplied by] the difference between the contract price and the otherwise applicable area or national rates" and interest. The refunds are to be paid both for Gulf's past defaults as well as for any occasion in the future in which Gulf again defaults on its delivery obligation. Coupled with the refund provision is a recoupment order as follows: [18]

collateral estoppel with citations to United States v. Utah Construction Co., 384 U.S. 394, 419 (1966); FTC v. Texaco, Inc., 517 F.2d 137, 143-48 (D.C. Cir. 1975), *petition for certiorari filed*, 45 U.S.L.W. 3708 (April 15, 1977); and In Re Federal Water & Gas Corp., 188 F.2d 100, 104-05 (3d Cir. 1951), *cert. denied* 314 U.S. 953 (1951). The question of res judicata and collateral estoppel in the administrative agency context is discussed in 2 K. Davis, *Administrative Law Treatise* §§ 18.02, 18.03 (1958).

[18] The Commission explained its position once again in Opinion No. 780-A:

> New England argues . . . that allowing Gulf to recoup its refund at the end of the contract period renders the entire refund a nullity. As noted, Gulf will lose the time value of the refund amount until recoupment. Further, if the refund represented compensation for ultimate failure to deliver gas rather than delay in delivering gas, Gulf would be relieved of its obligation to deliver the gas for which the refund represented compensation. Various of the customers have objected strenuously to any procedure which will relieve Gulf of its obligation, and we agree. If the refund provision were taken as full compensation for the non-delivered gas, Texas Eastern and its customers would have no claim on Gulf before Gulf had delivered 4.4 TCF. They would then have to buy in the general market at a time when, under this order, Gulf is permitted to begin to recoup its refund while contining to be obliged to deliver gas.

> In the Commission's opinion fairness to the consumer demands that where Gulf has defaulted on its undertaking to supply gas at a given price, Gulf should make payments in order to leave Texas Eastern and the consumers in approximately the same economic position they would have been if they received the gas.
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> * * * *
>
> Texas Eastern argues that provision for refunds would prevent it from receiving the amount of the undelivered gas. That is not our intention. The refund is designed to compensate Texas Eastern and its customers for Gulf's failure to make full deliveries in the past. The contract amount of 4.4 Tcf remains in effect. However, it is correct that delivery of 4.4 Tcf at the contract price, and payment of refunds would mean that Gulf was not receiving the compensation to which it was entitled. At the same time, Gulf's default has caused present damage which requires relief. Therefore, we shall provide that when Gulf has delivered an amount of gas equivalent to the contract amount less the amounts of gas for which it has paid refunds, Gulf shall be permitted to charge the contract price plus the amount of the refunds previously paid to an equivalent amount of gas.
>
> A hypothetical example may clarify our decision. Assume it was found that before Gulf resumed satisfaction of its contract obligations it had defaulted in the following amounts:
>
> 1/1/76 -6/21/76 90 Bcf at 7¢ [26¢-19¢]/Mcf=$6.3 million
> 6/21/74-12/4/74 40 Bcf at 23¢ [42¢-19¢]/Mcf=$9.2 million
> 12/5/74-7/26/76 150 Bcf at 33¢ [52¢-19¢]/Mcf=$49.5 million
> 7/27/76-12/1/76 20 Bcf at $1.23 [1.42-19¢]/Mcf=$24.6 million
>
> Then Gulf would be required to refund immediately, plus appropriate interest, $89.6 million. Then, when

it had delivered all by 300 Bcf of the contract amount, it would be permitted to recoup its refunds by adding a surcharge of 7¢/Mcf to the next 90 Bcf sold, 23¢/Mcf to the next 40 Bcf, etc., until the entire contract was fulfilled, and the entire refund recouped.

Over the entire contract, Gulf would have received exactly the contract price for all 4.4 Tcf, but it would, in effect, have been required to lose the time value of its money required to compensate its customers for their losses due to Gulf's non-delivery in accordance with the terms of the contract.

Gulf argues that the Commission lacks statutory authority to order any refunds at all [19] while New England contends that the Commission erred in coupling to the refund order the procedure for recoupment. Without attempting to catalogue all the situations in which the Commission may appropriately order refunds, we hold

[19] In its brief, Gulf also argues that it was not given adequate notice and an opportunity to be heard on the issue of refunds. At oral argument, however, counsel for Gulf informed the court that Gulf did not wish to press that argument. Under these circumstances, we think it appropriate to limit our discussion of this issue to the following observations: First, the record demonstrates that regardless of possible deficiencies of notice in the original show cause order, subsequent events put Gulf on early notice that the Commission would consider the issue of refunds. Second, the record also reveals that Gulf prepared and presented its position on the matter of refunds with considerable vigor in the FPC proceedings, notwithstanding its alleged lack of notice. Third, all of the cases cited by Gulf for the proposition that midstream notice or late notice cannot be any better than no notice at all concern the adequacy of notice in rule-making proceedings. *See, e.g.*, Consolidated Edison Co. v. FPC, 512 F.2d 1332 (D.C. Cir. 1975); Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973); Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973), *cert. denied sub nom* Big Rivers Elec. Corp. v. EPA, 425 U.S. 934 (1976); Texaco Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969). Accordingly, we see no reason to reverse or modify the Commission's order on the ground of inadequate notice and opportunity to be heard.

that the refund-recoupment order here under review falls within the Commission's statutory power.

A. *FPC Power to Order Refunds*

The starting point for our analysis is section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c): [20]

> (c) No natural-gas company . . . shall engage in the . . . sale of natural gas, subject to the jurisdiction of the Commission . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity is-

[20] In its brief to this court and at oral argument, the FPC attempted to justify its refund order also by reference to section 7(b) of the Act, 15 U.S.C. § 717f(b):

> (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission . . . .

The Commission argues in its brief that any reduction in the quantity of gas delivered constitutes an abandonment of service within the meaning of section 7(b) and requires prior Commission approval. Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co., 177 F.2d 942, 945 (6th Cir. 1949). *See also* Reynolds Metals Co. v. FPC, 543 F.2d 379, 384 (D.C. Cir. 1976); *cf.* United Gas Pipe Line Co. v. FPC, 385 U.S. 83, 86-89 (1966). The Commission argues that Gulf's underdeliveries to Texas Eastern therefore constitute a violation of section 7(b), and that the refund order is a proper exercise of Commission authority under that section combined with section 16.

Attractive as this argument may be, we are not permitted to consider it, for the Commission's reliance on section 7(b) has come too late. In Opinion No. 780-A, the Commission placed exclusive reliance on section 7(c), even after section 7(b) was brought to its attention on the issue of refunds. Since "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency," SEC v. Chenery Corp., 332 U.S. 194, 196 (1947), we may review the refund order only by reference to section 7(c), the sole ground invoked by the agency. *See also* Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962).

sued by the Commission authorizing *such* acts or operations . . . .

(Emphasis supplied.) The Commission found that Gulf violated section 7(c), holding in essence that since Gulf's certificate authorized daily deliveries of 625,000 MCF on demand by Texas Eastern and not deliveries in some lesser amount, Gulf's underdeliveries constituted a sale of natural gas as to which there was no certificate in force. Although there appears to be no precedent for an application of section 7(c) to an underdelivery under a certificate of public convenience, neither has Gulf cited any authority against it, nor any sufficient reason, so far as we can see, to read the section otherwise. Gulf does not contest the Commission's authority in an appropriate case to order a producer to comply with the terms of its certificate and the source of that authority must be section 7(c) combined with sections 7(a) and 7(e).[21]

The next question is whether the Commission's refund-recoupment order is an appropriate remedy for the violation by Gulf of section 7(c) and of the terms of its certificate. In order to affirm the order, we need find

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[21] Section 7(a), 15 U.S.C. § 717f(a), provides in pertinent part:

> (a) Whenever the Commission . . . finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to . . . sell natural gas to any person . . . legally authorized to engage in the local distribution of natural or artificial gas to the public.

Section 7(e), 15 U.S.C. § 717f(e), provides in pertinent part:

> (e) Except in the cases governed by the provisos contained in subsection (c) [not relevant to this case], a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale [or] service . . . covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service, sale or operation . . ., to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; . . . .

only that it is appropriate, not that it is the only appropriate or most appropriate remedy which might have been devised. "Once the existence of a rational basis for the Commission's action is ascertained the reviewing power is estopped from further consideration of the Commission's action." *Southern California Edison Co.* v. *FPC*, 387 F.2d 619, 621 (3d Cir. 1967), *cert. denied*, 392 U.S. 909 (1968). *See also Mesa Petroleum Co.* v. *FPC*, 441 F.2d 182, 189 (5th Cir. 1971).

The scope of the Commission's remedial powers is defined by section 16 of the Act, 15 U.S.C. § 717o:

> Sec. 16. The Commission shall have power to perform any and all acts and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.
>
> • • • •

In the view of the Commission, Section 16 may be analogized to the necessary and proper clause of the Constitution: once a matter has been found to be a proper subject of Commission concern, section 16 empowers the Commission to exercise wide discretion in selecting the tools with which to safeguard the public interest in matters relating to the transportation and sale of natural gas. Gulf submits, however, that section 16 does no more than implement "authority *otherwise* conferred upon the Commission." (Emphasis in Gulf's brief.) Finding nothing in section 7(c) (or elsewhere in the Act) which authorizes the Commission to award refunds in the case of an underdelivery, Gulf concludes that the refund-recoupment order cannot be predicated upon section 16.

The leading case in support of the Commission's position is *Mesa Petroleum Corp.* v. *FPC*, *supra*. Hugoton Production Co., a gas producer, held a certificate of public

convenience and necessity for the sale of gas to Panhandle Eastern Pipe Line Co. Without receiving Commission approval, Hugoton terminated its deliveries to Panhandle and at a later date, Hugoton applied to the Commission for permission to abandon those deliveries *nunc pro tunc*. The Commission determined that no abandonment should be permitted, and it ordered Hugoton to refund to Panhandle the difference between what it actually paid and what it would have paid for the gas had there been no abandonment. Mesa Petroleum Co., successor in interest to Hugoton, petitioned the Fifth Circuit for review and raised the following question:

> Does the Natural Gas Act [the Act] empower the Commission to make an award of "damages" to a pipeline company or its customers for injuries allegedly resulting from the producer's termination of deliveries to the pipeline?

441 F.2d at 186.

The Fifth Circuit began its analysis by recognizing that the Commission's primary responsibility under the Natural Gas Act is to the consumer. *E.g., California Gas Producers Ass'n* v. *FPC*, 421 F.2d 422, 428 (9th Cir. 1970). The *Mesa* court then construed section 16 as a grant of remedial power to the Commission which, in keeping with the Commission's duty to serve the public interest, could not be limited to the express remedies provided by other sections of the Act. The *Mesa* court relied on the expansive construction given section 309 of the Federal Power Act, 16 U.S.C. § 825h (1970)—employing identical language to section 16 of the Natural Gas Act—in *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153, 158 1967):

> While such "necessary and appropriate" provisions do not have the same majesty and breadth in statutes as in a constitution, there is no dearth of decisions

> making clear that they are not restricted to procedural minutiae, that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.

Quoted in *Mesa*, 441 F.2d at 187. Again quoting *Niagara Mohawk*, 379 F.2d at 159, the *Mesa* court opined that "the breadth of agency discretion is . . . at its zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies, and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives." *Mesa*, 441 F.2d at 187-188. This view of the Commission's section 16 power together with the Commission's enforcement of a specific provision of section 7(b) provided sufficient answer, in the view of the Fifth Circuit, to the contention that the refund order was unlawful.[22] 441 F.2d at 188-89.

Gulf suggests that *Mesa* must be distinguished from the instant case. In *Mesa*, Gulf points out, the Commission had found a section 7(b) violation based on the gas producer's failure to secure Commission approval of its cutback in service whereas the instant case involves only a section 7(c) violation. Moreover, Gulf maintains, *Mesa* was also based to some degree on the gas producer's refusal to follow FPC prescribed procedures generally. We do not agree that these factors provide any meaningful distinction.

First, although it is true that the Commission did not address the question whether Gulf has violated section

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[22] The *Mesa* court also rejected the contention that a refund order is a matter of equity within the exclusive jurisdiction of the courts as well as the argument that the refunds constituted an unauthorized "penalty." The court also expressed its belief that "it is of no consequence that there were other avenues which the Commission could have chosen for enforcement, such as an injunction, or a criminal proceeding." 441 F.2d at 189.

7(b),[23] the circumstances of this case are not in reality very different from those in *Mesa*; like Hugaton, Gulf has terminated part of its certificated service without the approval of the Commission. That the termination in *Mesa* was treated as a violation of section 7(b) and here as a violation of the certificate and of section 7(c) does not diminish the FPC's remedial powers. Secondly, nothing in *Mesa* supports Gulf's theory that the decision was predicated on the wrongfulness of the producer's conduct rather than the appropriateness of refunds to remedy any violation of the Act which has resulted in consumer injury. Thus, we perceive no meaningful distinction between this case and *Mesa*. Our inability to distinguish *Mesa* does not mean, however, that we must necessarily follow the *Mesa* decision. Authority from other circuits teaches that section 16 has a more narrow scope than that which the *Mesa* court gave it.

Gulf cites a number of cases which generally lend credence to its position that section 16 exists only to implement authority otherwise conferred upon the Commission.[24] The best statement of this position is found in *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1257 (D.C. Cir. 1973):

> The substantive provisions of the Act contemplate certain procedures as incident to the functions provided. The range of permissible procedures must be derived from these sections, sections like sections 4 and 5 of the Natural Gas Act, and the functions

[23] *See* note 20, *supra*.

[24] Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1257 (D.C. Cir. 1973); New England Power Co. v. FPC, 467 F.2d 425, 426 (D.C. Cir. 1972) *aff'd*, 415 U.S. 345 (1974); City of Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971) *cert. denied*, 405 U.S. 1074 (1972); Murphy Oil Corp. v. FPC, 431 F.2d 805, 810 (8th Cir. 1970). Gulf also cites FPC v. Texaco, Inc., 417 U.S. 380 (1974), but the Supreme Court held there only that section 16 "does not authorize the Commission to set at naught an explicit provision of the Act." *Id.* at 394.

> they describe. Section 16, which uses a broad generality of "necessary and appropriate" that is not rooted in a function, cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined.

While it is true, as the FPC argues, that *Mobil Oil* concerned an attempt by the FPC to use section 16 to dispense with procedures mandated by the Act, the quoted language of Mobil Oil suggests that the District of Columbia Circuit would not sanction the expansive reading of section 16 which the Fifth Circuit approved in *Mesa*. *But cf. United States Steel Corp.* v. *FPC*, 533 F.2d 1217, 1222-23 (D.C. Cir. 1976). We think that the interpretations of section 16 in *Mesa* and *Mobil Oil* are irreconcilable.

We find the approach taken by the *Mesa* court to be the more persuasive of the two, at least for the purposes of this case, although we need not go as far as the *Mesa* court did. Our concern in this case is with a procedure which will ultimately result in a loss to Gulf of nothing more than the time value of the money: If Gulf fully complies in the future with its delivery obligations, it will recoup every dollar that it has been ordered to refund. The refund-recoupment order is an efficient, fair, and reasonable exercise of discretion to compel compliance with section 7(c) of the Natural Gas Act. It is neither analogous to damages, reparations, nor penalties since Texas Eastern's customers ultimately will be required to repay all the money obtained under the refund order. The order is, in our view, nothing more than a temporary performance bond made necessary by Gulf's failure to fulfill the terms of its certificate. Viewed in this light, the Commission's refund-recoupment order can be sustained without reading section 16 as broadly as *Mesa* does. To affirm the Commission, we need only find that section 16, if it does nothing else, at least gives the Commission power

to take reasonable, temporary measures to assure compliance with its orders.

We believe that a natural and commonsense reading of section 16 allows the Commission this latitude. The statutory authority of the Commission to "carry out the provisions of [the Act]," set forth in section 16, and to perform "any and all acts, and to . . . issue . . . such orders . . . as it may find necessary or appropriate" implies the necessary power to achieve compliance in the public interest with the Commission's lawful orders.

We do not mean to imply that every refund-recoupment order is entitled to a per se affirmation. Any such order must have a "rational basis," *Southern California Edison*, *supra*, 387 F.2d at 621, and may be set aside if arbitrary, capricious or an abuse of discretion. 5 U.S.C. § 706(2)(A). We believe that the Commission's refund-recoupment order in the instant case, however, meets these standards.

The FPC was confronted in this case with a massive default on the part of Gulf, a blatant breach of the warranty on the basis of which Gulf was awarded its certificate. In Opinion Nos. 692 and 692-A, the Commission had made clear to Gulf its determination that Gulf's obligation was unconditional and that no change in circumstances resulting from Gulf's mistaken reserves estimate would excuse Gulf from delivery of the full 625,000 MCF per day, yet Gulf had neither petitioned for review of that decision nor taken steps to meet its delivery obligations. In short, the Commission was justified in believing that Gulf needed a reasonable, external prod to ensure its compliance with the Commission's order.[25]

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[25] The Commission had before it a copy of the agenda for a meeting of Gulf's law department shortly after the issuance of Opinion No. 692. Three possible corporate actions were listed for discussion:

The refund-recoupment order also serves two other important purposes. First, by requiring that Gulf pay a refund on every occasion in the future that it underdelivers, the order discourages non-compliance. Second, by reducing the profits Gulf achieved by its past derelictions, Gulf and other gas producers are put on notice that nothing is to be gained by failing to timely comply with their certificates of public convenience.

Given the circumstances of this case and the sound purposes and public interest to be served by the refund-recoupment order in protecting consumers with an adequate supply of natural gas at just and reasonable rates, *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960), we hold that the refund-recoupment order has a rational basis and is neither arbitrary nor capricious, nor an abuse of the Commission's discretion.

B. *Recoupment*

New England petitions us to set aside the Commissions' recoupment order while leaving intact the order of refunds. We cannot do so, not because we believe

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A. A decision not to commit additional gas to the performance of the Texas Eastern Contract at the present contract prices.

B. A decision to make no decision but await action by the Commission, Texas Eastern, Texas Eastern's customers, or a representative of the public, to enforce the contract and/or the certificate before the Commission or in the courts.

C. A decision to make every effort to fulfill the contract by delivery of all gas which can be reasonably delivered to Texas Eastern.

In light of Gulf's subsequent conduct, the Commission may reasonably have inferred that Gulf chose Option B, knowing full well that the Commission would view underdeliveries as a violation of the certificate. This evidence of Gulf's attitude affords additional justification for the refund-recoupment order.

that every refund order must be complemented by a provision for recoupment—we need not decide that question in this case—but because of a fundamental flaw in New England's argument.

New England does not contend that the Commission was obligated to order refunds, nor does any authority with which we are familiar hold that the Commission is ever required to supplement an order enforcing performance of certificate obligations with a provision for refunds. Since there is no obligation to order any refunds, there can be no abuse of discretion in the Commission's refusal to order irrecoverable refunds—in effect, penalties—assuming, without deciding, that the Commission would be legally empowered to do so. We cannot fault the Commission for ordering the recoupment of funds when it was under no mandate to order their refund in the first place. We will, therefore, affirm the provisions for recoupment in the Commission's order.

C. *The Refund Formula*

Gulf contends that even if the Commission is empowered to order refunds, the formula by which these refunds are calculated is erroneous. The Commission's formula is based on the difference between the contract rate and the prevailing area or national rates set by the Commission from time to time.[26] Gulf belives that the refund formula should instead be based on the difference between the contract rates and the actual rates at which Texas Eastern procured replacement gas. The Commission had this to say on the refund formula:

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[26] For an explanation of these rates, *see* Shell Oil v. FPC, 529 F.2d 1061, *rehearing denied*, 525 F.2d 1261 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976).

> In our opinion, the staff's formula, based upon the applicable area or national rate, should be followed in the present situation where expeditious relief is desirable. Conditioning relief on actual proof of the myriad affects [sic] of Gulf's non-delivery could lead to endless proceedings. Staff's suggested measure of payment is an equitable estimate of damage to the customers.

We find no abuse of discretion in the refund formula. In addition to the Commission's rationale, which we find persuasive, we have considered two other factors. The first is the nature of the refund-recoupment order of which the formula is a part. That order is not intended as a measure of damages but as a method of enforcing compliance with the certificate; the refund is recoverable upon satisfaction of the delivery obligations. Thus, the dispute over the formula is comparable to a dispute over the amount of a security bond. In the case of such a bond, the amount fixed by the district court will not be disturbed absent an abuse of discretion, *see, e.g., Stockslager* v. *Carroll Elec. Co-op Corp.*, 528 F.2d 949 (8th Cir. 1976); *Lektro-Vend Corp.* v. *Vendo Co.*, 405 F.Supp. 527 (N.D. Ill. 1975) *aff'd* 544 F.2d 1050 (7th Cir. 1976), *rev'd on other grounds*, 45 U.S.L.W. 4971 (June 29, 1977), and we believe the same standard should pertain here. We cannot say that the Commission's formula is so unreasonable as to constitute such an abuse of discretion. Second, Gulf's assertion that the actual replacement rates were lower than the FPC prescribed area or national rates is not supported by any citation to the record. In the absence of any evidence that the rates differed, we cannot say that the Commission's choice of area or national rates constituted an abuse of discretion. Accordingly, we will affirm the Commission's refund Formula.

D. *Interest*

We will also affirm the Commission's order that the refunds include a component of interest, designed to compensate the customers of Texas Eastern for the loss of the time value of the additional money they paid for natural gas dues to Gulf's default. As we read the Commission's order, Gulf will recoup the interest component of the refunds together with the portion representing the difference in rates. The interest is thus just one part of the refund-recoupment scheme and the dispute over interest is nothing more than another aspect of the dispute concerning the amount of the bond to be required of Gulf. As such, the Commission's determination is reviewable only for abuse of discretion, and we find no abuse in the interest aspect of the Commission's refund order. We also see no merit in Gulf's contention that under 28 U.S.C. § 1961 the interest can only run, if at all, from October 15, 1976, the date on which Opinion No. 780 was issued. Section 1961 applies by its terms only to civil cases in the United States district courts. Accordingly, we will affirm the inclusion of interest in the refund order.[27]

IX. *Intrastate Sales*

The Commission ordered Gulf to file with it all contracts for the intrastate sale of natural gas.

> In view of Gulf's failure in recent years to comply with the delivery requirements of the certificate issued to it, we believe it important for us to review any future intrastate sales proposed by Gulf to ascertain whether such gas should be sold by Gulf to Texas Eastern under the subject certificate. Accordingly, we shall require Gulf to file with the Commission all contracts for the sale of gas in intrastate commerce made after the date of this order.

[27] We also can discern no error in the rates of interest set by the Commission—7 percent per annum for underdeliveries prior to October 10, 1974, and 9 percent thereafter—in the absence of any indication that they are too high other than Gulf's unsupported assertion that they are "plainly excessive." *Cf.* American Public Gas Assoc. v. FPC, 546 F.2d 98, 987-88 (D.C. Cir. 1976); City of Cleveland v. FPC, 525 F.2d 845, 850-51 n. 38 (D.C. Cir. 1976).

Gulf objects not to the request for information *per se* but to the implication which Gulf discerns in the Commission's opinions that the Commission might in the future attempt to *regulate intrastate* sales which are beyond its jurisdiction under section 1(b) of the Act, 15 U.S.C. § 717(b).

In Opinion No. 780-A, responding to this contention by Gulf, the Commission stated that it is "now only asking for information of intrastate sales." As Gulf concedes the collection of such data is not improper, *Continental Oil Co.* v. *FPC*, 519 F.2d 31 (5th Cir 1976), *cert. denied*, 425 U.S. 941 (1976), and we will, therefore, affirm this aspect of the Commission's order. Only if and when the Commission attempts actually to regulate Gulf's intrastate sales will the question of the Commission's authority to do so become ripe for decision.

X. *Congressional Interference*

Gulf contends that members and staff of the Commission were subjected to improper interrogation and interference regarding their decision of this case by the Subcommittee on Oversight and Investigation and the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce. Citing *Pillsbury* v. *FPC*, 354 F.2d 952 (5th Cir. 1966), and *D.C. Federation of Civic Associates* v. *Volpe*, 459 F.2d 1231 (D.C. Cir. 1972), Gulf submits that the pervasive infection of the Commission's decision resulting from the Congressional interference can be cured only by our setting aside the Commission's order in its entirety. The FPC

responds by denying both the existence of any improper Congressional interference and the applicability of *Pillsbury* and *D.C. Federation*. Having carefully considered the transcripts of the subcommittee hearings and the correspondence between the subcommittee and the Commission, we conclude that the Commission order should not be set aside on this basis.

We agree, of course, with the principles underlying *Pillsbury*: The courts must not tolerate undue legislative interference with an administrative agency's adjudicative functions. We also are sensitive to the legislative importance of Congressional committees on oversight and investigation and recognize that their interest in the objective and efficient operation of regulatory agencies serves a legitimate and wholesome function with which we should not lightly interfere. We do not believe, however, that the extent and nature of the Congressional involvement in the FPC's conduct of this case warrants reversal of the Commission's order. The record shows that the subcommittees' interest in this case, although substantial, was directed at accelerating the disposition and enforcement of the FPC's compliance procedures. It was avowedly directed not at the FPC's decision on the merits but at the Commission's determination to conduct a lengthy show cause hearing rather than to seek immediate injunctive relief in the federal district court.[28]

[28] When the interrogation by a member of the Subcommittee on Oversight and Investigation invaded the decisional area of the FPC's function, FPC General Counsel Journey replied that it would be inappropriate for him to comment. Chairman Dingell of the subcommittee responded that it was not the intention of his committee to "intrude into matters under judicial consideration by the Commission . . . I want your understanding to be very clear on that point." He reemphasized that the committee was not interested in influencing the consideration, deliberation, or conclusions of the Commission.

The Subcommittee on Energy and Power was concerned at its oversight hearing with the Commission's failure generally to seek

Although the Committee expressed its concern because of the delay of the Commission in enforcing its order and the obligations of the certificate holders, including Gulf specifically, the record, in contrast to *Pillsbury*, *supra*, does not disclose a "searching examination as to how and why [the FTC] reached [a] decision in a case still pending . . . and to criticize [the Commission] for reaching the 'wrong decision.'" *Pillsbury* v. *FPC*, 354 F.2d at 964. Nor does it reveal any effort to influence the Commission in reaching any decision on the specific facts of the case. Any intrusion by subcommittee members into the Commission's actual decisional process concerning the merits of the show cause proceeding, *see Pillsbury*, 354 F.2d at 964, was only incidental to the purpose of accelerating the FPC's disposition of the case.

We are persuaded that these incidental intrusions by two or three members [29] into the FPC's decisional process did not seriously influence the Commission. First, it is not clear that the interrogation of a few members reflected the view of the majority of the subcommittee, not to mention the full committee or the Congress. Secondly, the obvious fact that the Commission doggedly refused to abandon the show cause proceeding despite the considerable pressure upon it to go to court is persuasive that the Commission was fully capable of with-

enforcement of gas production contracts by court injunction rather than administrative hearings. At the hearings of this subcommittee, Counsel Journey again pointed out the inappropriateness of discussing the merits of the FPC's pending enforcement action against Gulf and Texas Eastern. This subcommittee's interrogation may have been indelicate at points since counsel were asked repeatedly not only why the Commission had opted to follow the time consuming show cause procedure rather than to seek an immediate injunction against further underdeliveries by Gulf, but also for their views on the interpretation of the Gulf-Texas Eastern contract. FPC counsel, however, carefully refrained from discussing the merits of the issues.

[29] Each of the subcommittees consisted of sixteen members.

standing incidental efforts, if any, by subcommittee members to influence its decision on the merits of the case. Thirdly, the Commission's prior decision in Opinion Nos. 692 and 692-A on April 19, 1974, more than a year before the subcommittee hearings, refutes any contention that the *idential* resolution of each issue in Nos. 780 and 780-A resulted from Congressional pressure upon the Commission.

We also do not believe that the legislative intrusions, if any, into the Commission's decisional process in this case come within the *Pillsbury* rule.[30] As we read *Pillsbury*, the court's concern was with *factual* prejudice—the prejudgment by the FTC of factual questions then pending before it.[31] A point of view—even bias induced by legislative interference—as to questions of law, on the other hand, does not necessarily render invalid an agency's decision, *United States* v. *Morgan*, 313 U.S. 409, 421 (1941); 2 Davis, *Administrative Law Treatise*, § 12.01 (1958). Members of an agency charged by Congress with adjudicatory functions "are assumed to be men of conscience and intellectual discipline capable of judging a particular controversy fairly on the basis of its own circumstances." *United States* v. *Morgan*, *supra* 313 U.S. at 421. Moreover, Judicial review is fully capable of correcting bias as to legal questions. *See*, *e.g.*, *Marquette Cement Mfg. Co.* v. *FTC*, 147 F.3d 589, 594 (7th Cir. 1945), *affirmed sub nom. FTC* v. *Cement In-*

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[30] D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1245-49 (D.C. Cir. 1972), is also not apposite. The basis on which the order of the Secretary of Transportation was held invalid in that case was not the existence of Congressional pressure upon him but his consideration in reaching his decision of factors "that Congress could not have intended to make relevant." *Id.* at 1246.

[31] *See* 254 F.2d at 958; Note, 42 N.Y.U.L.Rev. 127, 128-29 (1967). *Pillsbury* is also noted in 52 Va. L.Rev. 946 (1966); 66 Colum. L.Rev. 1351 (1966); and 50 Minn.L.Rev. 1136 (1966).

stitute, 333 U.S. 683 (1948). The essential adjudicative facts in the instant case are undisputed; all the issues decided by the Commission were entirely legal in nature concerning the interpretation of a contract and a certificate of public convenience. We have considered *de novo* as we are obligated to do each of the legal issues raised by Gulf; on each, we have independently reached the same conclusion as the Commission. Even assuming *arguendo* the Commission's decision reflected legislative interference, our decision does not.

Weighing these factors—the importance and need for Congressional oversight of regulatory agencies, the Commission's evident strong backbone in resisting subcommittee pressure, the Commission's identical resolution of each issue in its prior decision, the entirely legal nature of the Commission's decision, and our agreement with that decision—against our commitment to the principle that administrative agencies must be allowed to exercise their adjudicative functions free of Congressional pressure, we conclude that the legislative conduct in this case did not affect the fairness of the Commission's proceedings and does not warrant our setting aside the Commission's order.

XI. *Conclusion*

For the reasons stated above, we find no merit in any of the arguments advanced by either petitioner. Accordingly, the order of the Federal Power Commission will be affirmed.

APPENDIX

THIS AGREEMENT, made and entered into as of the —— day of ————————, 1963, by and between GULF OIL CORPORATION, a Pennsylvania corporation, hereinafter referred to as "Seller," and TEXAS EASTERN TRANSMISSION CORPORATION, a Delaware corporation, hereinafter referred to as "Buyer,"

WHEREAS, Buyer owns and operates a natural gas pipeline transmission system, together with facilities and properties used in connection therewith; and

WHEREAS, Seller owns or controls oil, gas and mineral leaseholds and/or lands located in southern Louisiana, and offshore thereof, and has a supply of gas in said areas available for delivery near Venice, Plaquemines Parish, Louisiana; and

WHEREAS, Buyer desires to purchase gas from Seller for a portion of the requirements of its said system; and

WHEREAS, the parties hereto have agreed that, except where the context otherwise indicates another or different meaning or intent, the following terms are intended and used herein and shall be construed to have meanings as follows:

* * * *

6. The term "Daily Contract Quantity" shall mean the applicable quantity of gas set out in Paragraph 1(a) of Article II hereof.

* * * *

NOW THEREFORE, in consideration of the premises and the mutual covenants and agreements herein contained, the parties hereto do hereby covenant and agree as follows:

I. SCOPE OF AGREEMENT

1. Subject to all of the terms, conditions and limitations hereinafter set forth, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller, gas, in the quantities hereinafter provided.

* * * *

4. From and after the date of initial delivery of gas under this Agreement and throughout the remainder of the stated term hereof, Seller warrants and agrees that there will be provided under the terms and provisions of this Agreement a quantity of gas sufficient to enable Seller to have available for delivery hereunder on any day or days a volume not less than one hundred twenty-five per cent (125%) of the Daily Contract Quantity in effect from time to time under the provisions of Subparagraph 1(a) of Article II hereof.

II. QUANTITY OF GAS

1. (a) Subject to the provisions of this Agreement the Daily Contract Quantity to be effective on and after the date of initial delivery shall be as follows:

Commencing	Daily Contract Quantity MCF/D
Date of Initial Delivery	150,000
November 1, 1965	250,000
November 1, 1966	325,000
November 1, 1967	425,000
November 1, 1968 through remaining term of contract	500,000

(b) During each year of the term of this Agreement, Buyer agrees to take and pay for, or pay for if available and not taken, a quantity of gas equal to eighty per cent (80%) of the sum of each Daily Contract Quantity in

effect during such year, multiplied by the number of days in such year each such Daily Contract Quantity is in effect.

(c) Buyer shall have the right to purchase from Seller hereunder at any time, and from time to time, quantities of gas greater than the Daily Contract Quantity then in effect hereunder; provided that Seller shall not be obligated to deliver in any day a quantity of gas in excess of one hundred twenty-five per cent (125%) of such Daily Contract Quantity. Buyer shall give Seller maximum prior notice, as permitted by its pipeline operating requirements, of changes in delivery rates of gas to be delivered hereunder.

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III. POINT OF DELIVERY

1. The point of delivery of the gas to be delivered by Seller to Buyer hereunder shall be at the outlet of Seller's meter station to be located at a mutually agreeable point in Section 25, Township 21 South, Range 30 East, Plaquemines Parish, Louisiana.

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X. FORCE MAJEURE

In the event of either party hereto being rendered unable, wholly or in part, by force majeure to carry out its obligations under this Agreement, other than to make payments due hereunder, it is agreed that on such party giving notice . . . then the obligations of the party giving such notice, as far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused . . . and such cause shall as far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed herein shall mean

acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accidents to machinery or lines of pipe, the necessity for making repairs to or alterations of machinery or lines of pipe, freezing of wells or lines of pipe, the failure of production facilities for causes other than depletion of the source of gas supply, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension; provided, however, that said term shall not mean or include any cause which by the exercise of due diligence the party claiming force majeure is able to overcome; and provided, further, that in no event shall said term mean or include partial or entire failure or depletion of gas reserves or sources of supply of gas. Such term shall likewise include (a) in those instances where either party hereto is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such servitudes, rights of way

• • • •

XII. TERM

This Agreement shall be effective from the date hereof and shall continue and remain in full force and effect for a term of twenty-six (26) years from the date of initial deliveries of gas hereunder, or to the date on which four billion four hundred thirty-seven million six hundred seventy-five thousand (4,437,670,000) MCF

of gas (exclusive of any excess gas purchased under the provisions of Article XVIII hereof) has been delivered to Buyer whichever shall first occur.

* * * *

XIV. REGULATORY BODIES

This Agreement is subject to all present and future valid orders, rules, and regulations of any regulatory body having jurisdiction.

XV. ARBITRATION

Any dispute arising between Seller and Buyer out of this Agreement shall be determined by a board of three arbitrators to be selected for each such controversy so arising as follows: . . . . Such board shall determine the matters submitted to it pursuant to the provisions of this Agreement. The action of a majority of the members of such board shall govern and their decision in writing shall be final and binding on the parties hereto. Each party shall pay the expenses of the arbitrator selected by or for it and all other costs of the arbitration shall be equally divided between the parties hereto.

* * * *

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

ALDISERT, *Circuit Judge*, Dissenting.

With the majority, I agree that the Commission properly construed Gulf's daily delivery obligation under the contract. My disagreement with the majority, however, while tracking a narrow compass, requires a different result. I believe that Gulf's petition for review should be granted to the extent that it argues that the Federal Power Commission erred in refusing to defer its decision on the questions submitted to the arbitrator until it received the decision of the board of arbitrators.[1]

My starting point is the strong federal policy favoring enforcement of arbitration when the parties have mutually agreed to so resolve contract interpretation disputes. Thus, in cases arising under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, it has been determined that "any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars. Such policy has been consistently reiterated by the federal courts and we think it deserves to be heartily endorsed." *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d Cir. 1959) (citations omitted).

Coexistent with this congressionally-declared public policy is the root source of arbitration, the law of contracts,

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[1] As stated by the Commission, there are before the arbitrators three questions:

> (1) whether Gulf's obligation for delivery of gas to Texas Eastern is limited to gas produced in the vicinity of the delivery points, (2) whether Gulf by reason of the mistakes as to gas reserves in West Delta Block 27 is excused from delivering the DCQ as provided in the contract, and (3) whether the failure of the Department of the Interior to hold regular general offshore Louisiana lease sales constituted an act of *force majeure* to relieve Gulf of its obligations.

Opinion No. 780 at 296A.

which directs that once parties have covenanted that arbitration shall be the method of resolving disputes, the parties should be held to that arbitration agreement. Gulf and Texas Eastern entered into a bargain relating to the delivery of natural gas. That bargain was reduced to a written contract containing a clear arbitration clause providing that "[a]ny dispute arising between Seller and Buyer out of this Agreement shall be determined by a board of three arbitrators . . . ." The Commission has conceded that the certificate issued by the FPC "accepted the contract with its arbitration provision." [2] Thus, we not only have parties to the contract agreeing that disputes over contract interpretation shall be first submitted to arbitration, but we have a situation where the Commission has approved that method as a first step to dispute resolution.

The Commission nevertheless concluded that because this proceeding involves "a matter of importance to the public," it, and not the arbitrators, should first decide the three issues submitted by Gulf to arbitration.[3] *In*

[2] Opinion No. 780 at 297A.

[3] The Commission's discussion on this subject follows:

> Gulf argues that because the Commission certificated the 1964 contract between Gulf and Texas Eastern, including the arbitration provision (Article XI), the question of the nature and extent of Gulf's obligations under the contract is properly before the arbitration board and is not within the primary jurisdiction of the Commission and therefore in a proper and reasonable exercise of its jurisdiction the Commission should reserve its ruling in the instant proceeding until such time as it received the benefit of the arbitrators' decision. In the opinion of the Commission this is not an appropriate case in which to defer decision.
>
> There are before the arbitrators three questions: (1) whether Gulf's obligation for delivery of gas to Texas Eastern is limited to gas produced in the vicinity of the delivery points, (2) whether Gulf by reason of the mistakes as to gas reserves in West Delta Block 27 is excused from delivering the DCQ as provided in the contract, and (3) whether the failure of the Department of the Interior to hold regular general offshore Louisiana lease sales constituted an act of *force majeure* to relieve Gulf of its obligations. These are largely technical matters relating to Gulf's service under its certificate. Thus the effect of designating a delivery point and defining what might be its vicinity, the effect of a mistake as to gas reserves and the effect of a moratorium on offshore leases on the ability of Gulf to deliver gas are matters peculiarly within the subject matter of this Commission's authority. In *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipeline Co.*, 226 F.2d 60 (CA6-1955), Certiorari denied, 350 U.S. 987 (1956), cited by Gulf, the Court said that intricate problems of service and problems of changing industrial conditions and growing needs of natural gas do not lend themselves in the first instance to hearing before a court and require the expertise of the Commission. The court contrasts these matters with the usual questions of law and fact which a court is authorized to handle and which require no special expert knowledge. The questions here belong in the first category and are properly considered by the Commission prior to submission to an arbitration board or a court. While our certificate accepted the contract with its arbitration provision, this did not mean that questions within the peculiar competence of the Commission must be first put before the board but rather the contractual matters that a court would handle.
>
> Furthermore, this proceeding involves a matter of importance to the public. Whether or not Gulf is living up to its contract and to its certificate is a matter of deep concern to this Commission in meeting its responsibilities under the Natural Gas Act. To defer further action until a board of arbitration issues an interpretation of the contract of the parties in a matter concerning the sale and delivery of gas in interstate commerce would at this juncture be unconscionable action on our part.
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> Opinion No. 780 at 295A-97A.

American Safety Equipment Corp. v. *J. P. Maguire & Co.*, 391 F.2d 821, 825-29 (2d Cir. 1968), perhaps the strongest support for the Commission's position, the arbitration agreement at issue was itself attacked as "an instrument of illegality". *Id.* at 827. Determining that such a claim under the antitrust laws was not merely a private matter, the court concluded that the antitrust claims raised were not appropriate for arbitration due to "the pervasive public interest in the enforcement of

the antitrust laws, and the nature of the claims that arise in such cases." *Id.* at 827-28. At first glance, this reasoning appears to support the Commission's conclusion in the present case, that because the delivery of natural gas involves a matter of importance to the public, it should not defer its action until the arbitrators have acted.

But this argument ignores the unique procedures available in the case before us. Unlike the circumstances in *American Safety*, here a federal agency which proposes to circumvent the arbitration forum had the opportunity to intervene *before* there was any performance under the agreement. When it issued a certificate of public convenience to Gulf, the Commission had the authority to approve or reject the contract between Gulf and Texas Eastern in whole or in part. If the delivery of natural gas is, in the Commission's words, "a matter of importance to the public", and if "[w]hether or not Gulf is living up to its contract and to its certificate is a matter of deep concern to the Commission in meeting its responsibility under the Natural Gas Act," then the Commission had an obligation to reject that portion of the contract calling for arbitration of disputes between the parties to the contract *at the time the contract was submitted to it for approval.* Dictates of sound reason and fair justice demand that it should have asserted that position to the parties at the time the contract was submitted as the basis for the certificate.

Simply put, the Commission cannot have it both ways. It cannot approve a contract as the basis of a certificate in the public interest and later, after performance by the parties, abrogate crucial portions of the approved contract ostensibly in the same public interest. Although cloaked with much authority, the Commission has no power to rewrite a contract it has approved.

The arbitration clause clearly called for "interpretation of the contract of the parties concerning the sale and delivery of natural gas in interstate commerce." If such a clause is an anathema to the FPC, it should reject any contract containing such a provision. It did not. It approved the contract containing this clause. Having approved the contract with the arbitration clause, the FPC cannot later say that deferring to this procedure would be "unconscionable". Rather, the reverse would seem to be true. To me it is unconscionable for any federal agency to renege on any contractual procedure it has previously approved, and upon which it has issued a certificate of public necessity.

Thus, just as our mightiest corporations and industries —entities which greatly affect the public interest—are bound by arbitration clauses in labor and commercial matters, here the parties and the FPC are bound to the arbitration clause under the dictates of both federal policy and the contract language. The Commission's apparent position that it possesses specialized knowledge gained from experience in the regulation of industry, *e.g.*, *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960), *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipeline Co.*, 226 F.2d 60 (6th Cir. 1955), *cert. denied*, 350 U.S. 987 (1956), which knowledge entitles its interpretation of contract provisions dealing with natural gas to greater weight than that of a court or a board of arbitrators,[4] is of no avail. It misses what I consider to be the controlling issue at bar: it is not whose interpretation of the contract provisions ultimately prevails; rather, it is whether the parties and the Commission should be bound by their agreement as to the *procedure* for the initial resolution of interpretation con-

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[4] Indeed, an inference can be drawn from the Commission's brief that the Commission believes it should have exclusive, virtually non-reviewable authority in this respect.

flicts. The Commission's reliance on *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 264 U.S. 137 (1960), and *Sun-Oil Co.* v. *F.P.C.*, 364 U.S. 170 (1960), is, in my view, irrelevant because these cases deal with the *interpretation*, not the *procedure* for initial interpretation. Only after the arbitrators' decision is reached should the Commission, and ultimately the courts, be permitted to decide any possible conflict between the legal precept that "[i]t is the arbitrator's construction which was bargained for," *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 399 (1960), and the FPC contention that because the three matters submitted to arbitration are matters requiring special expert knowledge, the arbitrators' interpretation will not be honored.

If the Commission wishes to commit its expert knowledge to the interpretation of all contractual provisions dealing with the distribution of natural gas, then, as a matter of policy, it should refuse to approve contracts between producers and distributors that contain arbitration provisions. But once it has given its approval, as it did here, it cannot blithely turn its face against the overriding important federal policy favoring arbitration.

Accordingly, I dissent from the denial of the petition to review the Commission's order.

APPENDIX B

No. 76-2596

GULF OIL CORPORATION,
Petitioner
vs.
FEDERAL POWER COMMISSION,
Respondent

PHILADELPHIA GAS WORKS, TEXAS EASTERN TRANSMISSION CORPORATION, MILTON CLARK, FREDERICK W. ROSE, and ST. REGIS APARTMENT, LTD., on behalf of themselves and all other similarly situated (PGW's Customers), WASHINGTON URBAN LEAGUE, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY, MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES, RHODE ISLAND DIVISION OF PUBLIC UTILITIES, RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS, RHODE ISLAND ATTORNEY GENERAL and RHODE ISLAND CONSUMERS' COUNCIL (New England), PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Intervenors

No. 77-1050

CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY, MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES, RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS, RHODE ISLAND ATTORNEY GENERAL, AND RHODE ISLAND CONSUMERS' COUNCIL,
Petitioners
vs.
FEDERAL POWER COMMISSION,
Respondent

PHILADELPHIA GAS WORKS, GULF OIL CORPORATION, BAY STATE GAS COMPANY, BOSTON GAS COMPANY, BRISTOL AND WARREN GAS COMPANY, CAPE CODE GAS COMPANY, COMMONWEALTH GAS COMPANY, THE CONNECTICUT GAS COMPANY, THE HARTFORD ELECTRIC LIGHT COMPANY, TOWN OF MIDDLEBOROUGH, MUNICIPAL GAS AND ELECTRIC DEPARTMENT, NEW BEDFORD GAS AND EDISON LIGHT COMPANY, NORTH ATTLEBORO GAS COMPANY, CITY OF NORWICH, DEPARTMENT OF PUBLIC UTILITIES, PEQUOT GAS COMPANY, PROVIDENCE GAS COMPANY, SOUTH COUNTY GAS COMPANY, THE SOUTHERN CONNECTICUT GAS COMPANY, TIVERTON GAS COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Intervenors

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2596

GULF OIL CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

PHILADELPHIA GAS WORKS, ET AL.,
Intervenors

No. 77-1050

CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY, ET AL.
Petitioners

v.

FEDERAL POWER COMMISSION,
Respondent

GULF OIL CORPORATION, ET AL.,
Intervenors

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges*

The petition for panel rehearing filed by Gulf Oil Corporation in the above-entitled cases having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

BY THE COURT,

/s/ Max Rosenn
Circuit Judge

Dated: Sep. 26 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2596

GULF OIL CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent.

PHILADELPHIA GAS WORKS, TEXAS EASTERN TRANSMISSION CORPORATION, MILTON CLARK, FREDERICK W. ROSE, AND ST. REGIS APARTMENT, LTD., on behalf of themselves and all others similarly situated (PGW's customers), WASHINGTON URBAN LEAGUE, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY, MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES, RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS, RHODE ISLAND ATTORNEY GENERAL AND RHODE ISLAND CUSTOMERS' COUNCIL (New England), PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE BROOKLYN UNION GAS COMPANY, PHILADELPHIA ELECTRIC COMPANY,

Intervenors

No. 77-1050

CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY, MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES, RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS, RHODE ISLAND ATTORNEY GENERAL, AND RHODE ISLAND CONSUMERS' COUNCIL,

Petitioners

v.

FEDERAL POWER COMMISSION,

Respondent

PHILADELPHIA GAS WORKS, GULF OIL CORPORATION, BAY STATE GAS COMPANY, BOSTON GAS COMPANY, BRISTOL AND WARREN GAS COMPANY, CAPE COD GAS COMPANY, COMMONWEALTH GAS COMPANY, THE CONNECTICUT GAS COMPANY, CONNECTICUT NATURAL GAS CORPORATION, FALL RIVER GAS COMPANY, THE HARTFORD ELECTRIC LIGHT COMPANY, TOWN OF MIDDLEBOROUGH, BEDFORD GAS AND EDISON LIGHT COMPANY, NORTH ATTLEBORO GAS COMPANY, CITY OF NORWICH, DEPARTMENT OF PUBLIC UTILITIES, PEQUOT GAS COMPANY, PROVIDENCE GAS COMPANY, SOUTH COUNTY GAS COMPANY, THE SOUTHERN CONNECTICUT GAS COMPANY, TIVERTON GAS COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, MILTON CLARK, FREDERICK W. ROSE AND ST. REGIS APARTMENTS, LTD. (PGW's customers), ALGONQUIN GAS TRANSMISSION COMPANY, PHILADELPHIA ELECTRIC COMPANY,

Intervenors

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Present: SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the record from the Federal Power Commission and were argued by counsel on June 7, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review from the orders of said Federal Power Commission, filed October 15, 1976, and December 9, 1976, are hereby denied and the order of the said Commission is affirmed. Costs taxed against petitioners.

ATTEST:

/s/ Thomas F. Quinn
Clerk

September 7, 1977

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. C164-26

GULF OIL CORPORATION AND
TEXAS EASTERN TRANSMISSION CORPORATION

OPINION NO. 780

OPINION AND ORDER ON DELIVERIES OF GAS UNDER CERTIFICATE AND WARRANTY CONTRACT

(Issued: October 15, 1976)

[Caption Omitted]

APPEARANCES

Warren M. Sparks, B. James McGraw, Carroll L. Gilliam and *Keith R. McCrea* for Gulf Oil Corporation

James W. McCartney and *Jack Head* for Texas Eastern Transmission Corporation

Augustine A. Mazzei, Jr., and *Carl J. Babin* for Equitable Gas Company

Norman A. Flaningam, Charles R. Brown, George L. Weber and *Henry P. Sullivan* for Consolidated Gas Supply Corporation, The East Ohio Gas Company and The Peoples Natural Gas Company

Victor H. Kramer, Richard B. Wolf, Diane Cohn, William Jordan and *Morton L. Simons* for Washington Urban League, Incorporated

Shelia Hollis, Peter H. Schiff and *Richard A. Solomon* for Public Service Commission of New York

Harry E. Barsch, Jr., James R. Patton, Jr., David B. Robinson and *James G. Beste* for State of Louisiana

Paul W. Fox and *John S. Schmid* for Algonquin Customer Group

Thomas E. Wiener for Philadelphia Gas Works

E. S. Kieby, J. R. Lacey and *William R. Duff* for Public Service Electric and Gas Company

Sharon A. Province for the Staff of the Federal Power Commission

CONTRACTS (Warranty), PRACTICE AND PROCERUDE (Show Cause), GAS SUPPLY (Offshore), ANTI-TRUST, CERTIFICATES (Delivery Obligations), REFUNDS (under-deliveries) FLOW THROUGH, JURISDICTION (primary)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Docket No. C164-26

GULF OIL CORPORATION AND
TEXAS EASTERN TRANSMISSION CORPORATION

OPINION NO. 780

OPINION AND ORDER ON DELIVERIES OF GAS UNDER CERTIFICATE AND WARRANTY CONTRACT

(Issued October 15, 1976)

DUNHAM, Chairman:

This proceeding concerns the failure of Gulf Oil Corporation (Gulf) to deliver to Texas Eastern Transmission Corporation (Texas Eastern) the amounts of gas required by its certificate of public convenience and necessity which was predicated on a warranty contract. It is before us after our order to show cause of November 7, 1975, directed to Gulf and Texas Eastern, a hearing, an initial decision issued August 13, 1976, by Presiding Administrative Law Judge Raymond M. Zimmet, and exceptions and briefs opposing exceptions.

On December 19, 1963, the Commission issued certificates to Gulf Oil to sell the gas and to Texas Eastern to transport the gas [1] based on a previous agreement, which was formalized as a contract on January 6, 1964.[2] Under the contract Gulf was to deliver 4,437,675,000 Mcf (about 4.4 Tcf) of gas to Texas Eastern over a twenty-six year term. After a four-year build-up period the Daily Contract Quantity (DCQ) was to be 500 Mcf per day through the remaining term of the contract. Texas Eastern agreed that during each year it would take and pay for 80 percent of the DCQ multiplied by the number of days in the year.

It was also prescribed that Texas Eastern "shall have the right to purchase from [Gulf at any time, and from time to time, quantities of gas greater than the Daily Contract Quantity then in effect hereunder; provided that seller shall not be obligated to deliver in any day a quantity of gas in excess of one hundred twenty-five per cent (125%) of such Daily Contract Quantity". This amounts to 625 MMcf per day. The price of gas depends upon the annual load factor and varies from a minimum 19.0 cents per Mcf at 100 percent to 20.987

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[1] *Texas Eastern Transmission Corp. et al.*, 30 FPC 1559 (1963).

[2] Gulf's FPC Gas Rate Schedule No. 278.

cents per Mcf at 80 percent annual load factor. The contract provided for an escalation of 2.0 cents per Mcf after ten years and an additional 1.0 cents per Mcf after twenty years. Deliveries to Texas Eastern commenced on November 1, 1964.

In making its application Gulf depended heavily on the West Delta Block 27 Field in which it believe it controlled 2,533 billion cubic feet of gas available for sale to Texas Eastern. However, it became apparent that the Block 27 reserves had been over-estimated and that only 1,006 billion cubic feet were available for sale to Texas Eastern and no gas is available from Block 27 today (Ex. SC-1). As related more fully below through subsequent years Gulf has connected available uncommitted supplies of gas in fulfillment of its delivery obligations to Texas Eastern. Among these it contracted to purchase reserves originally estimated at 731 Bcf from SLAM.[3]

Despite Gulf's acquisition of further reserves, it entered into negotiations with Texas Eastern and amended its contract on August 2, 1971, providing for an increased price or the area price, whichever was higher, for reserves connected in the Southern Louisiana and Texas Gulf Coast areas after July 1, 1971, that the term would be changed to the date on which 4,437,675 trillion cubic feet would be delivered, that all connected leases and purchase contracts would be dedicated to the performance of the amended contract, that Gulf agreed to dedicate all gas reserves it discovers in the vicinity of Texas Eastern's pipeline system or its own to maintain the delivery quantity of 625 MMcf daily, and that additional gas would be made available to Texas Eastern.

Gulf filed an application to amend its certificate to conform to the contract amendment, but this was denied

[3] Signal Oil Gas Company, Louisiana Land and Exploration Company, Amerada-Hess Corporation and Marathon Oil Company.

by the Commission in Opinion No. 692 and 692-A (51 FPC 1340, 52 FPC 593). The Commission found that Gulf's contractual warranty was unconditional, as were its certificate obligations. The Commission accepted Gulf's miscalculation of the reserves as a good faith error, but said Texas Eastern and the Commission were induced to accept Gulf's estimate at a time when a surplus of gas was available. The Commission found no basis for relieving Gulf of its errors at the expense of Texas Eastern's ratepayers. The Commission also rejected the application in the absence of proof that Gulf could not fulfill its certificate obligations through expanded and intensified exploration and development efforts. The Commission said that Gulf enjoyed the benefits of the contract and must now bear its burdens.

Since January 1, 1971, Texas Eastern has consistently demanded 625 MMcf per day except in circumstances when it could not absorb this amount because of system supply, storage inventories or repairs (Tr. SC 360-362), and it developed that Gulf was unable to fulfill this maximum contract quantity. In 1973, Gulf's deliveries averaged 509 MMcf per day; in 1974, 391 MMcf per day; and the first nine months of 1975, 366 MMcf per day.[4] On November 7, 1975, the Commission issued the show cause order initiating this proceeding saying that Gulf's failure to live up to its warranty obligations with the concomitant reduction in service to Texas Eastern customers should be examined. It also made Texas Eastern a respondent and directed it to show cause why it should not be required to pursue all administrative and judicial remedies available to it with respect to Gulf's failure to meet its delivery obligations under the warranty contract and the certificate issue to Gulf. On November 20, 1975, purportedly under its contract, Gulf

[4] When *force majeure* is taken into account these figures become 553, 427 and 412 MMcf per day respectively (Ex. SC-3).

initiated a proceeding for arbitration of a dispute as to whether its obligation for delivery of gas under the contract is limited to gas purchased in the vicinity of the delivery points and other matters (Ex. SC-23).

In the Commission's show-cause proceeding a hearing was held in January and March of 1976; briefs were exchanged; and the Judge issued his initial decision on August 13, 1976. The Judge denied Gulf's argument that the Commission should not decide this case until an arbitration board rules on the question of Gulf's delivery obligations, that it is relieved of its delivery obligations if the cost is too high, that the Commission should leave it alone because it is trying in good faith to meet its certificate obligations and that it will be completely free of its certificate obligations once the 26-year term of the contract expires.

The Judge found that while the Commission had power to order refunds, such a remedy would be time consuming and would not necessarily prod Gulf into timely future compliance. He also rejected a recommendation of the staff that Gulf divert gas to Texas Eastern from intrastate purchasers that entered into contracts with Gulf after its proposed certificate amendment was denied in 1974, pointing out that these intrastate purchasers are not parties.

The Judge would give Gulf a short period—no later than the first day of the first calendar month following the Commission's final decision—to bring itself into compliance with its maximum as well as minimum daily delivery obligations, and thereafter Gulf and Texas Eastern would file monthly reports of gas demanded and quantities supplies. In the event Gulf failed to comply with its certificate obligations, the Commission, he said, should proceed immediately against Gulf in the federal District Court to compel specific performance.

The Judge said that Texas Eastern had scarcely lifted a finger to force Gulf to fulfill its delivery obligations and that Texas Eastern's inaction concerning Gulf smacks of a conspiracy between the two of them to withhold gas from the interstate market until the price has been driven up in violation of federal antitrust laws. For these reasons the Judge recommends that the Commission transmit relevant evidence to the United States Department of Justice pursuant to Section 20(a) of the Natural Gas Act, urging that an investigation be made and that appropriate criminal action be taken.

Exceptions were filed by Gulf, Texas Eastern, Public Service Electric and Gas Company (Public Service), Consolidated Edison Company of New York, Inc., The Public Service Commission of the State of New York (New York), The Washington Urban League (WUL) and the staff of this Commission. Briefs opposing exceptions were filed by Public Service, Texas Eastern, WUL, Gulf, Philadelphia Gas Works, Customers of Philadelphia Gas Works, and the Commission staff. The Commonwealth of Massachusetts filed a motion for leave to file a brief *amicus curiae* opposing exceptions and the brief.

GULF'S PERFORMANCE AND NEED FOR COURT ACTION

Gulf argues that there is no basis for the Judge's recommendation that the Commission file suit in the Federal District Court against Gulf unless it commences delivery of the maximum contract volume the month after the Commission's decision. In this connection Gulf points to the record that it has made substantial and successful efforts to increase its gas supply. Thus at the first Federal offshore Louisiana sale after the record closed in the prior proceeding Gulf on September 12, 1972, acquired 12 tracts at a total expenditure of $131,-

284,000. At this and subsequent sales it paid $576,-315,000 for 55 tracts, spending $53,390,000 in the most recent sale on February 18, 1976 (Ex. SC-7, SC-8). In addition during the past five years it spent $197,-988,000 to explore and develop connected and newly acquired leases (Exs. SC-36, SC-37). Of this amount expenditures of $167,647,000 were divided among gas leases ($28,857,000), oil and casinghead gas leases ($41,142,-000), and combination leases ($97,648,000 (Ex. SC-36). Since April 1, 1974 [5] Gulf spent $270,726,000 on acquisition of leases and exploration and development (Ex. SC-37).

Gulf submitted a study to show that it commenced wildcat drilling soon after it acquired leases and developmental drilling promptly after the platform was installed (Ex. SC-9, SC-3). In the case of 13 leases where there had been developmental drilling Gulf spent a total of $331,543,700 and obtained 292 Bcf of proved and 764 Bcf of probable reserves (Ex. SC-33). However, in the case of 22 leases where only wildcat wells have been drilled, 14 of the leases, so far, had only dry holes.

Gulf has also presented evidence to show that past deliveries to Texas Eastern and estimated total of gas reserves available amounts to 5,904 Bcf (Exs. SC-12, SC-19). This includes total deliveries as to September 30, 1975, in the amount of 1,831 Bcf, proved reserves of 1,216 Bcf, probable reserves of 824 Bcf and geological reserves of 2,033 Bcf, the last representing the basis on which bids were made. Gulf points out that deliveries have averaged 523 Mcf per day since the end of the build-up period (Ex. SC-3) and that the record indicates an average daily deliverability of 534 Bcf for 1977 increasing to 625 Bcf in 1979 (Ex. SC-19), so that the full contract volume of 4.4 Tcf will be delivered in 1987 be-

[5] Opinion No. 692 was issued on April 19, 1974.

fore the end of the contract term and that this does not include Gulf's interest in South Timbalier Block 35 which it acquired in January 1976. With respect to the geological reserves, it admitted, however, that it could not be certain that the reserves and deliverability shown will be the actual results of the eventual development and delivery of gas from these leases.

While Gulf has attempted to show some success from its efforts in procuring gas reserves, Gulf has not always procured a gas supply where it did not consider it economical to do so. Thus Gulf declined to buy Mobil's share in Grand Isle Block 94 and 95 when it appeared that it would lose some 20 million dollars over the life of the project, thus eliminating 302.8 Bcf of reserves amounting to 98 MMcf per day (Ex. SC-27, pp. 7, 10).

Gulf asserts that the Judge misunderstood its position that it is not obligated to incur unreasonably high costs to deliver a specific gas reserve. Gulf says that its position is that the cost of delivering each reserve must be considered to see if it is reasonable or exorbitant. In any case, it says through its policy witness McDonnell, regardless of any such legal limitation, it intended to deliver the gas from its new offshore Louisiana Leases to Texas Eastern by one means or another. (Tr. SC-72-3), but qualifies its intention by saying there must be some reasonable economic basis and it might have to work out arrangements with other pipelines with Commission approval by which some of the gas might have to be shared with another pipeline (Tr. 174-5, 179, 262-3, 308-9, 316-7). It concludes, however, that construction of its own lines and arrangements with other pipelines will permit expeditious delivery of its new reserves to Texas Eastern.

Furthermore, it argues that its good faith is not negated by its position that the contract terminates at the

end of the 26-year term. It says its legal position is borne out by the wording of the contract (Article XII that the term is 26 years or delivery of the 4.4 Tcf "which ever shall first occur", but it adds that the record shows that it has not malingered and it would be willing to amend the contract to provide that it shall continue until the 4.4 Tcf has been delivered.

Gulf predicts that it will be able to deliver over 500 MMcf per day beginning in 1977 and 625 MMcf per day in 1978 and contends that a suit for specific performance in a Federal District Court, as recommended by the Judge, would not be in the public interest. It also contends that a court would be unable to overcome the time-consuming physical difficulties of placing offshore leases in production, would not consider the costs of Gulf's uncommitted gas reserves, and could not order others to sell gas to Gulf.

Texas Eastern agrees that Gulf cannot be forced to deliver gas that it does not have. Texas Eastern quotes the evidence of its witness Bufkin that there would be a remedy or recovery from the present level of delivery (Tr. SC-386-7). It emphasizes that results of Gulf's acquisition, exploration and development operations. Public Service believes that the Judge's 30-day deadline is impossible, but the Commission should order Gulf to follow procedures to bring its deliveries to Texas Eastern up to the certificated levels as soon as reasonably possible. New York recommends, and Consolidated Edison agrees, that the Commission determine that Gulf dedicate to Texas Eastern by contracts within 90 days all of the recoverable reserves on the leases that presently are attached or will be attached fulfill its warranty obligations. The staff recommends that Gulf be required to deliver to Texas Eastern all gas from uncommitted reserves acquired after 1971 until reserves sufficient to deliver the 625 Mcf daily quantity are attached.

As discussed above, Gulf has made some efforts to increase its reserves and we are hopeful that it will be successful. However, as the record shows, Gulf entered into a contract that was advantageous to it at the time in disposing of ample gas supplies, but in no year has it reached an average of 625 MMcf per day since the highest deliveries occurred in 1972 amounting to only 605 MMcf per day. From that time the record indicates that deliveries decreased down to 357 MMcf per day in 1975 (Ex. SC-19). We would be neglectful of our responsibilities if we did no more than monitor Gulf's future deliveries. Something is required to assure the public that every possible step is being taken to effect Gulf's delivery of the quantities of gas for which the certificate was issued. In these circumstances Gulf should be given only a limited time to bring its deliveries up to a maximum level of 625 Mcf per day as required by the contract and certificate. The Commission has the right and the duty to use the full extent of its powers to force required deliveries. Therefore, we shall require that Gulf deliver to Texas Eastern at a rate of 625 MMcf per day beginning on December 1, 1976, except to the extent that Texas Eastern, on notice to the Commission, and for good cause shown, demands less. Should Gulf fail to make the required gas deliveries, the Commission will apply to a Federal court of appropriate jurisdiction to enforce compliance with our order.

The record shows that Gulf has commenced approximately twenty five intrastate sales since the issuance of Opinion No. 692.[6] In view of Gulf's failure in recent years to comply with the delivery requirements of the certificate issued to it, we believe it important for us to review any further intrastate sales proposed by Gulf to ascertain whether such gas should be sold by Gulf to Texas Eastern under the subject certificate. Accord-

[6] Exhibit 13.

ingly, we shall require Gulf to file with the Commission all contracts for the sale of gas in intrastate commerce made after the date of this order. In the absence of such a condition, it would not be possible to protect adequately the viability of our certificate order against the possibility of Gulf selling gas in intrastate commerce which should go to Texas Eastern. In these circumstances we have authority under Section 16 to remedy the situation. *Niagara Mohawk Power Corp.* v. *F.P.C.*, 379 F.2d 153.

REFUNDS

Contrary to the Judge's determination not to require refunds WUL argues that the Commission should exercise its authority to require refunds that will flow through to the consumers injured by the prior certificate violations. WUL does not think that further hearings are necessary; the Commission need only prescribe a formula. New York suggests that after fulfillment of Gulf's obligation to sell 4.4 Tcf, Gulf should be permitted to charge the then applicable nationwide rate, provided that the rate be reduced to reflect a repayment to Texas Eastern and its customers of the damages arising from Gulf's failure to meet its daily volumetric obligations. The staff contends that refunds are an appropriate remedy to insure that Gulf will have sufficient economic incentive to supply the maximum volumes to Texas Eastern's customers.

In the Commission's opinion fairness to the consumers demands that where Gulf has defaulted on its undertaking to supply gas at a given price, Gulf should make payments in order to leave Texas Eastern and the consumers in approximately the same economic position they would have been if they received the gas. Gulf contends that to do so a further hearing is necessary. Here, however, there is no necessary determination of specific

amounts involved, but only the determination of a formula. Gulf can subsequently compute the amount of payment, subject to the Commission's approval.

The staff recommends that refunds be measured by the difference between Texas Eastern's request for gas and Gulf's deliveries times the difference between the contract price and the otherwise applicable area of national rate. WUL would measure refunds by the differences between the certificate price and the cost of replacement gas multiplied by the number of Mcf necessary to replace the undelivered quantities. In our opinion the staff's formula, based upon the applicable area or national rate, should be followed in the present situation where expeditious relief is desirable. Conditioning relief on actual proof of the myriad effects of Gulf's non-delivery could lead to endless proceedings. Staff's suggested measure of payment is an equitable estimate of damage to the customers. This formula will also apply to future failures to deliver demanded amounts of gas.

Texas Eastern argues that provision for refunds would prevent it from receiving the amount of the undelivered gas. That is not our intention. The refund is designed to compensate Texas Eastern and its customers for Gulf's failure to make full deliveries in the past. The contract amount of 4.4 Tcf remains in effect. However, it is correct that delivery of 4.4 Tcf at the contract price, *and* payment of refunds would mean that Gulf was not receiving the compensation to which it was entitled. At the same time, Gulf's default has caused present damage which requires relief. Therefore, we shall provide that when Gulf has delivered an amount of gas equivalent to the contract amount less the amounts of gas for which it has paid refunds, Gulf shall be permitted to charge the contract price plus the amount of the refunds previously paid on an equivalent amount of gas.

A hypothetical example may clarify our decision. Assume it were found that before Gulf resumed satisfaction of its contract obligations it had defaulted in the following amounts:

1/1/76 -6/21/76	90 Bcf at 7¢ [26¢-19¢]/Mcf=$6.3 million
6/21/74-12/4/74	40 Bcf at 23¢ [42¢-19¢]/Mcf=$9.2 million
12/5/74-7/26/76	150 Bcf at 33¢ [52¢-19¢]/Mcf=$49.5 million
7/27/76-12/1/76	20 Bcf at $1.23 [1.42-19¢]/Mcf=$24.6 million

Then Gulf would be required to refund immediately, plus appropriate interest, $89.6 million. Then, when it had delivered all but 300 Bcf of the contract amount, it would be permitted to recoup its refunds by adding a surcharge of 7¢/Mcf to the next 90 Bcf sold, 23¢/Mcf to the next 40 Bcf, etc., until the entire contract was fulfilled, and the entire refund recouped.

Over the entire contract, Gulf would have received exactly the contract price for all 4.4 Tcf, but it would, in effect, have been required to lose the time value of its money required to compensate its customers for their losses due to Gulf's non-delivery in accordance with the terms of the contract.

REMEDIES AGAINST TEXAS EASTERN

WUL and the staff contend that the Commission might order Texas Eastern to reduce its rates because of costs imprudently incurred. They argue that Texas Eastern has failed to protect its customers' interests by failing to enforce its contractual and certificate rights against Gulf. The Judge rejected this remedy, finding that Texas Eastern had no adequate notice that such relief would be sought against it here. WUL and the staff contend that the show cause order and the hearing itself gave Texas Eastern adequate notice. The Commission agrees with the Judge that it is inconsistent to grant relief for the higher costs of substitute gas against both Gulf and

Texas Eastern. This is particularly true because Gulf is being required to make refund to Texas Eastern, and it is only proper in this case, as in others, that the refund be flowed through to Texas Eastern's distribution customers. See *Texas Eastern Transmission Corp.* v. *F.P.C.*, 414 F. 2d 344 (CA5—1969), *certiorari denied*, 398 U.S. 928 (1970); *Texas Eastern Transmission Corp.* v. *F.P.C.*, 470 F.2d 757 (CA5—1972).

To this end we shall require that Texas Eastern file a plan of flow through which will reflect not merely deliveries of its various customers, but the amount of detriment suffered by those customers because of Gulf's failure to deliver the full contract amounts requested by Texas Eastern. To achieve this result opportunity will be afforded for the customers and interested state commissions to participate in the determination.

As noted above, the Judge has suggested that Texas Eastern may engage in a conspiracy with Gulf to raise interstate gas prices and recommends reference to the Department of Justice under Section 20(a) of the Natural Gas Act that provides in part that the Commission may transmit such evidence as may be available concerning apparent violations of the Federal antitrust laws to the Attorney General, who in his discretion may institute the necessary criminal proceedings. The Antitrust Division has already requested and received the materials in this proceeding, and a formal reference to the Attorney General would be superfluous.

LEGAL ISSUES DISCUSSED BY GULF

1. Gulf argues that the Judge erred in concluding that it was in violation of its certificate obligations and should not have relied on one article of the contract to determine that it failed to deliver the minimum daily contract quantity of 500 MMcf per day or the maximum

of 625 MMcf per day. Rather the obligations are measured by every provision and clause of the contract. Thus, it says, the Daily Contract Quantity among other things, provides the basis for the calculation of the contemplated sales volumes of 4.4 Tcf during the 26-year term of the contract. However, Gulf does not indicate otherwise how it thinks the Judge has misinterpreted the contract except for its position that its obligation for delivery is limited to gas produced in the vicinity of the delivery point set out in Article III of the contract and secondary delivery points established by amendments taking into consideration the price provided by the contract, the volume of gas involved, and the cost of delivering such gas.

In the opinion of the Commission the certificate issued December 19, 1963, approved a sale and service proposed by Gulf. This sale and service was described in the application including the proposed contract, but this does not mean that all terms of the contract are approved or prescribed by the certificate. Thus it is commonplace that a certificate may be granted for a sale under a contract expressing a limited term, but the certificate, unless it specifies otherwise, is of indefinite duration. See *Sun oil Co.* v. *F.P.C.*, 364 U.S. 170 (1960).

Here the contract describes the kind of service to be rendered. In Article II the DCQ is stated to be 500 MMcf, but the buyer has the right to purchase 125 percent of that DCQ or 625 MMcf. It is true that at the 500 MMcf per day rate the specified quantity of gas (4,437,675,000 Mcf) will be delivered in 26 years, but that does not mean that it cannot be delivered in less than 26 years or that 625 MMcf per day cannot be demanded on most or all days. The contract in Article III provides for a point of delivery, and other points of delivery have been added, but there is nothing in the contract which confines the gas supply to that produced

in the vicinity of the delivery points. It is clear therefore, as the Judge found, that Gulf has in terms violated its contract and the certificate.

2. Gulf argues that the Judge erred in construing Opinions 692 and 692-A as making binding determinations of Gulf's obligations, and that the doctrines of *res judicata* and collateral estoppel do not apply. We think it entirely appropriate that the Judge cited Opinions 692 and 692-A on the nature of Gulf's obligations. Opinion 692 said that Gulf's contractual warranty and its certificate obligations are unconditional. This is persuasive. But we do not rest the present opinion and order in this show cause proceeding solely on statements in Opinion Nos. 692 and 692-A but on our reexamination of the contract and the record in this case.

3. Gulf argues that because the Commission certificated the 1964 contract between Gulf and Texas Eastern, including the arbitration provision (Article XI), the question of the nature and extent of Gulf's obligations under the contract is properly before the arbitration board and is not within the primary jurisdiction of the Commission and therefore in a proper and reasonable exercise of its jurisdiction the Commission should reserve its ruling in the instant proceeding until; such time as it receives the benefit of the arbitrators' decision. In the opinion of the Commission this is not an appropriate case in which to defer decision.

There are before the arbitrators three questions: (1) whether Gulf's obligation for delivery of gas to Texas Eastern is limited to gas produced in the vicinity of the delivery points, (2) whether Gulf by reason of the mistakes as to gas reserves in West Delta Block 27 is excused from delivering the DCQ as provided in the contract, and (3) whether the failure of the Department of the Interior to hold regular general offshore Louisiana

lease sales constituted an act of *force majeure* to relieve Gulf of its obligations. These are largely technical matters relating to Gulf's service under its certificate. Thus the effect of designating a delivery point and defining what might be its vicinity, the effect of a mistake as to gas reserves and the effect of a moratorium on offshore leases on the ability of Gulf to deliver gas are matters peculiarly within the subject matter of this Commission's authority. In *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipeline Co.*, 226 F.2d 60 (CA6-1955), Certiorari denied, 350 U.S. 987 (1956), cited by Gulf, the Court said that intricate problems of service and problems of changing industrial conditions and growing needs of natural gas do not lend themselves in the first instance to hearing before a court and require the expertise of the Commission. The court contrasts these matters with the usual questions of law and fact which a court is authorized to handle and which require no special expert knowledge. The questions here belong in the first category and are properly considered by the Commission prior to submission to an arbitration board or a court. While our certificate accepted the contract with its arbitration provision, this did not mean that questions within the peculiar competence of the Commission must be first put before the board but rather the contractual matters that a court would handle.

Furthermore, this proceeding involves a matter of importance to the public. Whether or not Gulf is living up to its contract and to its certificate is a matter of deep concern to this Commission in meeting its responsibilities under the Natural Gas Act. To defer further action until a board of arbitration issues an interpretation of the contract of the parties in a matter concerning the sale and delivery of gas in interstate commerce would at this juncture would be unconscionable action on our part.

As to the substance of these contentions, by this order and by Opinion 692 the Commission has, in effect, determined that the obligation to deliver gas is not limited to the vicinity of the delivery points and Gulf is not excused by reason of its mistakes with respect to Block 27, because the contract is unconditional and has no such provisions. With respect to the failure of the Department of the Interior to hold lease sales it is the Commission's opinion that this is not an act of *force majeure* relieving Gulf of its obligations. Article X provides that *force majeure* shall include "in those instances where either party hereto is required to obtain . . . permits or licenses to enable such party to fulfill its obligation hereunder, the inability of such party to acquire . . . such . . . permits or licenses". In the first place the purchase of a lease in the federal domain is not a license or a permit. Further, the contract does not specify where the gas must be produced; it need not necessarily come from the federal domain offshore requiring the purchase of a lease.

4. Gulf further argues that it is not obligated to deliver gas to Texas Eastern where the cost of delivery would be unreasonable. There is nothing in the 1964 contract that would support this view, which is contrary to the Commission's determination in Opinion 692 that the contractual warranty and the certificate obligations are unconditional. Article X covers the usual categories of *force majeure*, acts of God, strikes, earthquakes, riots and insurrections and also the inability to obtain servitudes, rights-of-way, materials, and permits or permission from any governmental agency, but does not list an excessive cost of gas as excusing deliveries.

It is true, as Gulf points out, that Opinion 692 states that the cost of delivering certain gas to Texas Eastern would have been "exorbitant". The Commission was not indicating an escape clause in the certificate, but merely

recounting Gulf's efforts to procure gas and the difficulties that were encountered in attempting to serve Texas Eastern. For this reason Gulf's attempt to define a standard of what a prudent producer should do is not relevant. Gulf entered into the contract at a time when it was to its advantage to do so. It cannot now employ or develop a new standard by which to excuse performance.

5. Gulf finally says that the Judge erred in concluding that the Commission had power to order refunds and that refunds would not be inappropriate. Gulf contends that it has been paid the contract price and that it has not collected amounts subject to temporary authorization or conditions, nor has it engaged in sales without a certificate or made an unauthorized abandonment. However, it has failed to deliver the amount of gas required by its contract and certificate. Its customer, Texas Eastern, would have had to procure that gas elsewhere. Therefore, Gulf has incurred a refund liability for the detriment caused Texas Eastern and the consumers. In *Mesa Petroleum Co.* v. *F.P.C.*, 441 F.2d 182 (CA5-1971) the producer improperly abandoned a sale to Panhandle Eastern Pipeline Company. The Court said that the Commission acted legally and correctly in ordering post-termination refunds for the difference between the contract prices and the average cost to Panhandle for replacement of gas unlawfully withheld. The Court noted that Section 16 of the Natural Gas Act has been construed broadly and gives the Commission power to perform any and all acts that are necessary or appropriate to carry out the provisions of the Natural Gas Act. Gulf, however, argues that Section 16 does not provide any independent statutory authority. But here Gulf has violated its certificate issued under Section 7(c) and (e), and Section 16 provides authority to remedy the situation. See also *Niagara Mohawk Power Corp.* v. *F.P.C.*, 379 F.2d 153, 159 (CADC-1967).

The issues in these proceedings have been thoroughly briefed, so that the Commission finds no need for oral argument.

NOTICE OF PROCEEDING AND HEARING

Gulf's 50 percent interest in production from Eugene Island Block 313 (SC Ex.-9, Sch. 1) is not now being delivered to Texas Eastern apparently because of problems in transporting this gas onshore. There is an existing pipeline in the vicinity of Block 313 owned jointly by Tennessee Gas Pipeline Company and Columbia Gas Transmission Corporation. Gulf's estimated share of 45 MMcf of gas (SC Ex.-29, Item 16) is urgently needed for fulfillment of the warranty contract. Since no order could be issued requiring transportation of such gas without notice and a hearing, by this order we shall initiate a separate proceeding (Docket No. CI77-30) to investigate this matter. Pursuant to Section 5 of the Outer Continental Shelf Act [7] and Section 7 of the Natural Gas Act [8], we shall examine the issue of whether Tennessee Gas and Columbia Gas should be required to transport gas from offshore Eugene Island Block 313 for Gulf. We shall also make Gulf a respondent and require it to present evidence as to precisely how much gas is available, the availability of transportation by other existing lines, and the estimated cost of delivery to Texas Eastern's system if Gulf itself were to transport this gas. Tennessee Gas and Columbia Gas should present any relevant evidence including:

(a) flow diagrams showing the present maximum capability and daily average flow for the CNT line, the Blue Water System, and all major lines connected to the Blue Water System. These flow diagrams should include the following:

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[7] 43 U.S.C. § 1334(c).

[8] 15 U.S.C. § 717(c).

(1) location of all input points giving the amount, the supplier, or for whom transported.

(2) location of all delivery points.

(3) pipe lengths, diameters, wall thicknesses, and MAOP,

(4) location of all compressor stations showing the horsepower, compression ratios, type of units, and horsepower currently utilized,

(5) pressures at all inputs and delivery points on the CNT line, the Blue Water System, and all the major lines connected to the Blue Water System,

(6) pressures at all compressor stations, separators, dehydrators, and plants,

(7) designation of the "null-point" on the east-west lateral.

(b) flow diagrams as requested in (a) after all facilities which have been certificated are installed on the CNT line, the Blue Water System, or on major lines connected to the Blue Water System. Also, give the dates when it is expected that each of the facilities will be installed, and the dates when it is expected that the new supplies proposed in the applications for the new facilities will come on line.

(c) for the gas which is currently being transported for others in these systems the following information:

(1) the transportation charge in ¢/Mcf-mile for the gases, and any other charges such as line loss, fuel, plant shrinkage, etc.,

(2) designation of where the gas is delivered to shore (Egan or Cocodrie), and

(3) any charges made for the transportation of liquids or liquifiables as defined by the company.

The Commission further finds:

(1) Gulf has failed to carry out responsibilities under its contract of January 6, 1964, and its certificate of public convenience and necessity issued December 19, 1963, particularly with respect to its deliveries of gas to Texas Eastern.

(2) Gulf should compute and pay a refund as provided below.

(3) Texas Eastern should be required to flow through the refund made by Gulf to its customers as provided below.

The Commission orders:

(A) Gulf shall deliver natural gas to Texas Eastern at the delivery points specified in its contract of January 6, 1964, as amended, at a rate of 625 MMcf per day beginning on December 15, 1976, except to the extent that Texas Eastern, on notice to the Commission, and for good cause shown, demands less. Should Gulf fail to make the required gas deliveries, the Commission will apply to a Federal court of appropriate jurisdiction to enforce compliance with our order.

(B) On December 15, 1976, Gulf shall file a computation of refunds to Texas Eastern, and serve it on all parties to this proceeding subject to the approval of the Commission and in accordance with the following formula. The refund shall be measured by the difference between Texas Eastern's requests for gas, but not more than the contract maximum amount, and actual deliveries from November 1, 1964, until December 1, 1976, times the difference between the applicable area or national rate and the applicable contract price. Damages would be assessed for each month deliveries fell below the amount demanded by Texas Eastern, if within the con-

tract maximum, excepting volumes attributable to *force majeure*. Gulf shall make the required refund to Texas Eastern within 30 days of Commission approval of Gulf's computation of refund. The refunds shall carry 7% interest to October 10, 1974, 9% thereafter.

(C) If in any month subsequent to the refund required in Paragraph (B) above Gulf fails to deliver the amount of gas required by the contract, it shall within 30 days make further refund to Texas Eastern in accordance with the above formula.

(D) When there remains to be delivered under Gulf's contract with Texas Eastern that amount of gas for which refund has been made, Gulf may file a rate change so that the price to Texas Eastern for appropriate volumes shall be the contract price plus the amount of the refund previously paid applicable to the same volumes.

(E) Within 120 days of the date of the final order in this proceeding, Texas Eastern shall submit a plan for the flow-through of the refunds herein ordered to be disbursed indicating the amount payable to each jurisdictional customer, the basis used to compute the amount payable, and the periods involved. Before doing so, Texas Eastern shall survey its customers and affected state regulatory commissions to determine an equitable division of the refund amount based on the costs to each customer of failing to receive the gas undelivered by Gulf. Copies of the flow-through plan shall be served on each of the parties to this proceeding, Texas Eastern's jurisdictional customers, and upon affected state regulatory commissions. Within 30 days of approval of Texas Eastern's plan, providing the refund has been received from Gulf, Texas Eastern shall proceed with the distribution of refunds to its jurisdictional customers. In case of any subsequent monthly refunds as provided in Paragraph (C) above, Texas Eastern shall prepare and file

similar allocation plans with the Commission and serve them on its customers and the state commissions within 30 days of receiving an additional refund.

(F) Within 10 days of the end of each month Gulf shall report to the Commission the average amount of gas per day that Texas Eastern has demanded during the month and the average amount of gas per day that Gulf has delivered during the month. Texas Eastern shall file an explanation within the same period of its reasons for failing to require maximum volume on any day on which such failure occurs.

(G) Pursuant to Section 5 of the Outer Continental Shelf Act and Sections 4, 5, 7, 14, 15, and 16 of the Natural Gas Act, a hearing shall be held to determine whether Tennessee Gas and Columbia Gas, as common carriers in the Federal Offshore Domain, should be required to transport Gulf's production from Eugene Island Block 313. Gulf is made a party respondent to this proceeding.

(H) Notices of intervention or petitions to intervene in this proceeding may be filed with the Commission on or before October 25, 1976, in accordance with the Commission's Rules of Practice and Procedure (18 C.F.R. 1.8).

(I) On or before November 2, 1976, Gulf, Tennessee, and Columbia Gas shall file their direct testimony and evidence. All testimony and evidence shall be served upon the Presiding Administrative Law Judge, the Commission Staff, and all parties to this proceeding. Should a proper application for the transportation of the subject gas be timely filed, this date and the hearing date in ordering paragraph (K) below may be deferred by future Commission order.

(J) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose (*see* Delegation of Authority, 18 C.F.R. 3.5(d)),

shall preside at the hearing in this proceeding pursuant to the Commission's Rules of Practice and Procedure.

(K) The Presiding Administrative Law Judge shall preside at a pre-hearing conference to be held commencing at 9:30 a.m. (EST) on November 16, 1976, in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426.

(L) The Commission Staff and all intervenors shall file their direct testimony and evidence on a date to be fixed by further order of the Presiding Administrative Law Judge.

(M) Gulf shall be required to file with the Commission all contracts for the sale of gas in intrastate commerce made after the date of this order.

(N) The Commission herewith adopts the decision, though not necessarily the language, of the Initial Decision of the Presiding Administrative Law Judge to the extent not inconsistent with this opinion.

(O) Exceptions not granted are denied.

(P) The motion of the Commonwealth of Massachusetts to file a brief *amicus curiae* opposing exceptions is granted.

(Q) Oral argument is denied.

By the Commission. A separate concurring statement by Commissioner Holloman will be issued at a later date.

[SEAL]

Commissioner Watt, concurring, filed a separate statement appended hereto.

KENNETH F. PLUMB,
Secretary.

Docket No. CI64-26

GULF OIL CORPORATION and TEXAS EASTERN TRANSMISSION CORPORATION

(Issued October 15, 1976)

WATT, Commissioner, *concurring*:

I concur with the result which this order will prompt —i.e., court review of this question—though I do not support nor endorse many parts of the supporting rationale and punitive actions sought to be imposed. Gulf states in its Brief On Exceptions To The Initial Decision that its "delivery obligations under its certificate are expressed in the Gulf-Texas Eastern contract in its entirety. That document is subject to construction under principles of contract law and rules of reason." I am satisfied that the only way we can extricate ourselves from this quagmire of contract interpretations is for a court of competent jurisdiction to tell us the exact legal force and effect of the various provisions of this and similar type contracts.

I would also note that the record does not support the intemperate language of the ALJ in this case. There is no place in the administrative process for unbridled emotionalism at the sacrifice of factual analysis and judicious applications of appropriate legal principles.

/s/ James G. Watt
Commissioner

[Caption Omitted]

(Issued December 9, 1976)

Page 7, 2nd full paragraph, line 20, change "December 1" to "December 15."

Page 16, line 6, change "Columbia Gas Transmission Corporation, to "Columbia Gulf Transmission Company."

Line 15, change "Gas" to "Gulf."

Page 19, Ordering Paragraph (G), line 4, change "Gas" to "Gulf."

Page 20, Ordering Paragraph (I), line 2, change "Gas" to "Gulf."

KENNETH F. PLUMB,
Secretary.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and John H. Holloman III.

Docket No. CI64-26

GULF OIL CORPORATION AND
TEXAS EASTERN TRANSMISSION CORPORATION

OPINION NO. 780-A

OPINION AND ORDER DENYING REHEARING IN PART

(Issued December 9, 1976)

CONTRACTS (Warranty), PRACTICE AND PROCEDURE (Show Cause), GAS SUPPLY (Offshore), ARBITRATION, CERTIFICATES (Delivery Obligations), REFUNDS (Under-Deliveries), FLOW THROUGH JURISDICTION (Primary), FORCE MAJEURE

[Caption Omitted]

OPINION NO. 780-A

OPINION AND ORDER DENYING REHEARING IN PART

(Issued December 9, 1976)

DUNHAM, Chairman:

Gulf Oil Corporation (Gulf) on November 12, 1976, Texas Eastern Transmission Corporation (Texas Eastern) on November 11, 1976, and Brooklyn Union Gas Company, Philadelphia Gas Works (PGW), the Public Service Commission of the State of New York (New York), and New England Intervenors (New England) on November 15, 1976, have filed applications for rehearing with respect to the Commission's Opinion No. 780 and order issued October 15, 1976. On October 26, 1976, PGW filed a motion for clarification, which was incorporated in the application for rehearing.

In Opinion No. 780 the Commission found that Gulf had failed in recent years to carry out its delivery responsibilities to Texas Eastern under its warranty contract of January 6, 1964, and its certificate of public convenience and necessity issued December 19, 1963. The Commission required Gulf to deliver gas to Texas Eastern at the rate of 625 MMcf per day beginning on December 15, 1976, unless Texas Eastern demands less. Also, the Commission required that Gulf compute and pay refunds to Texas Eastern based on the deficiency of deliveries and the area or national rate applicable to new gas purchases at the time of underdelivery. The refunds would be flowed-through the Texas Eastern's jurisdictional customers. Provision was made for a hearing in Docket No. CI77-30 to determine whether Tennessee Gas Pipeline Company or Columbia Gulf Transmission Company should transport Gulf's production from Eugene Island Block 313. On November 26 the Commission approved a settlement agreement in this docket which made arrangements for the transmission of the subject gas.

The applications for rehearing are, in part, repetitive of the contentions made in prior briefs, but a number of points have been amplified, particularly by Gulf, and require further comment.

THE CERTIFICATE AND CONTRACT

Gulf argues that the Commission erred in reading the contract to require Gulf to deliver 625 MMcf of gas on every day that Texas Eastern requests it. Gulf notes that the Daily Contract Quantity (DCQ) of gas to be delivered is 500 MMcf, and says the contract contemplates a "swing" between 80 percent of the DCQ (400 MMcf per day), and 125 percent of the DCQ (625 MMcf per day), but that the contract does not contemplate sudden conversion of the maximum (625 MMcf per day) into a DCQ and a continuous delivery obligation.

The contract provides that "Seller warrants and agrees that there will be provided under the terms and provisions of this Agreement a quantity of gas sufficient to enable Seller to have available for delivery hereunder *on any day or days* a volume not less than one hundred twenty-five percent (125%) of the Daily Contract Quantity. . . ."

The contract in II.1(a) sets forth a Daily Contract Quantity of 500 MMcf after November 1, 1968. In (b) an obligation to take gas is imposed on the buyer, Texas Eastern, amounting to 80 percent of the DCQ. In (c), rights are granted to the buyer as follows:

> Buyer shall have the right to purchase from Seller hereunder *at any time, and from time to time,* quantities of gas greater than the Daily Contract Quantity then in effect hereunder; provided that Seller shall not be obligated to deliver in any day a quantity of gas in excess of one hundred twenty-five per cent (125%) of such Daily Contract Quantity . . . (emphasis added)

Clearly, the Buyer can take 625 MMcf "at any time." It is also privileged to take that amount "from time to time," that is, not all the time. This would be a natural protection to the Buyer at a time when there were

ample gas supplies, but it in no way prevents him from requesting 625 MMcf "at any time." Furthermore, the record in this case (Exhibit SC-3) clearly shows that Gulf willingly delivered average daily amounts far above 500 MMcf per day before any controversy arose. Documents 5 of Exhibit SC-30 would indicate that as far back as 1970 Texas Eastern was demanding 625 MMcf per day on the vast majority of all days, and Gulf was complying.

Gulf argues that to the extent the Commission has reached conclusions as to certificate obligations independently of the contract, it has erred. The Commission issued a certificate to Gulf on December 19, 1963, for the sale of natural gas in interstate commerce for resale proposed in its application. We agree with Gulf that the certificate obligations as to the sale and the service proposed by Gulf track the contract terms. However, it is the Commission's duty to interpret those terms as so incorporated, and it is the Commission's holding that Gulf is obligated to deliver 625 MMcf per day, subject to a lesser request from Texas Eastern and the *force majeure* provisions, to the extent they apply.

Gulf objects to the Commission's requirement that it shall deliver gas to Texas Eastern at a rate of 625 MMcf per day beginning on December 15, 1976, except to the extent that Texas Eastern, on notice to the Commission, and for good cause shown, demands less. Should Gulf not comply, the Commission will seek enforcement in a Federal court of appropriate jurisdiction. Gulf says that circumstances beyond Gulf's control preclude delivery of daily quantities up to 625 MMcf per day by December 15, 1976. It lists arrangements to obtain additional supplies of gas and emphasizes that it is proceeding diligently with great expenditure of effort and capital to meet its obligations under the contract. It asks the Commission to vacate the Ordering Paragraphs of Opinion

No. 780, and substitute the filing and monitoring proposal set forth in its brief on exceptions.

The Commission is aware of Gulf's difficulties, and does not deny Gulf's efforts. The fact remains, however, that such efforts have thus far fallen short. There is now a very acute natural gas shortage, and Gulf's failure to meet the daily delivery requirements of its contract is one contributing factor. The Commission holds that Gulf's failure to meet the 625 MMcf per day requirement by December 15, 1976, would warrant presentation of the matter to a court so that an appropriate solution can be reached for the benefit of all parties and the consumers.

The record in this proceeding shows that projections of the actual amount of gas Gulf can deliver are subject to considerable change as new efforts are made and new conditions become known. Thus, for example, Gulf's application for rehearing and other actions indicate a deliverability considerably above that postulated in the record. At pages 67 and 68 of its application, Gulf indicates that by January 1, 1977, it will be delivering "approximately 575 MMcf per day" even though its testimony in the record (SC-160, *et seq.*, 176-177, 228) indicated that wells now connected could not produce over 500 MMcf per day and that a level above 500 MMcf per day could be delivered only sometime within 1977. Furthermore, Gulf has filed in Docket Nos. CI77-95, CI77-96, and CI77-97 to make additional sales to Texas Eastern amounting to over 36 MMcf per day. These applications have been noticed, and responses are due on December 8, 1976. Also, Gulf's application indicates that at times unspecified but in the very near future, there will be available an additional 42 MMcf per day from Grand Isle Block 95, 10 MMcf per day from Vermillion Block 23, and 3 MMcf from West Cameron Block 266. Gulf has continued to apply to make sales to other cus-

tomers which could have conceivably, by displacement or otherwise, been delivered to Texas Eastern. See, for example, the applications in Docket Nos. CI76-643, CI76-694, and CI77-102. Finally, it should be noted that the full amount of Gulf's maximum delivery obligation to Texas Eastern, 228 Bcf per year, is approximately 40% of Gulf's sales to all interstate pipelines, and less than one-third of its total gas sales.

All of this information indicates that Gulf is now coming close to meeting its obligation, and that its deliveries are variable with effort. Since the record provides no proof beyond bare assertion that Gulf cannot deliver the full contract amount if so required, the Commission should not lightly assume such impossibility. We believe that a court is the proper place to judge Gulf's possible future explanations should it, in fact, fail to comply with the Commission's order. The Commission is of the opinion that the record and actions in this case do not indicate an absolute barrier to deliveries at any particular level, but rather the availability of varying amounts of gas, dependent upon the money and exertions dedicated to the delivery of such gas.

The power of a court, in our opinion, would be useful in bringing about the most advantageous result in the light of all the circumstances facing the parties. The Natural Gas Act in Section 20(a) authorizes the Commission to seek a solution in this way and because of the importance of this case to the public, it is appropriate that we do so here.

Gulf also argues that the sequence of events here, consideration by the Commission soon after the filing of briefs opposing exceptions, further consideration a week later, and issuance of an order two days after that consideration, indicates that Gulf's brief opposing exceptions could not have been given careful consideration. This matter involved a substantial amount of gas at a time

of gas shortage. A draft order was considered at two Commission meetings a week apart. There certainly can be no serious argument that this Commission is incapable of reaching a reasoned decision expeditiously if it chooses to focus on an important issue. "It is not for the courts, short of flagrant extremes, to tell the administrative agencies how long they must ponder before coming to a decision." *Florida Economic Advisory Council* v. *F.P.C.*, 251 F.2d 643 (CADC, 1957), *certiorari denied*, 356 U.S. 959 (1958).

Gulf continues to argue that reliance should **not** be placed upon Opinion Nos. 692 and 692-A (51 FPC 1340, 52 FPC 593) denying Gulf's application for a certificate amendment, and that in doing so, the Commission has deprived Gulf of a fair hearing and due process of law. It says that the proceeding culminating in the issuance of Opinion Nos. 692 and 692-A was legislative in character and the principles of *res judicata* and collateral estoppel have no applicability. Gulf also requests rehearing and reconsideration of the determinations made in those Opinions. We are of the opinion that our earlier decisions were adjudicative insofar as they construed Gulf's contract, and that the doctrine of *res judicata* is viable in that context. *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966). However, as we said in Opinion No. 780, we do not rest our decision solely on statements in Opinion Nos. 692 and 692-A, but on our reexamination of the entire record in this case.

THE REFUND

Gulf argues that the Commission in its order to show cause of November 7, 1975, did not clearly specify issues regarding refunds or damages and, therefore, Gulf has not been afforded adequate notice or opportunity to be heard on these issues. Our order required Gulf to show cause why the Commission should not determine "that

Gulf is in violation of its certificate obligations and why it should not be required to comply with such obligations." We think consideration of an appropriate remedy, which could well be in damages, naturally followed from such a show cause requirement. The possibility of a refund remedy was discussed in the hearing (SC 470-511), and in the briefs to the Administrative Law Judge and the Commission. Gulf cannot claim any surprise or lack of opportunity to address the issues.

Gulf continues to argue that the Commission has no authority to order a refund. It says that Section 16 of the Natural Gas Act, authorizing the Commission to perform any and all acts necessary or appropriate to carry out the provisions of the act, is only supportive of other authority and that *Mesa Petroleum Co.* v. *F.P.C.*, 441 F.2d 182 (CA5, 1971), relied on by the Commission, involved an unauthorized abandonment under Section 7(b) which is not involved here. In the instant situation, it says, there are no existing powers which lawfully could be implemented via Section 16. On the contrary, Section 7(c) provides that no natural-gas company shall engage in the transportation or sale of natural gas subject to the jurisdiction of the Commission "unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." Gulf's certificate authorized "the sale of natural gas in interstate commerce for resale proposed in its application," which included the agreement precedent to its contract; it was authorized to sell natural gas at the certificate or contract rate of delivery, not on some other terms or lesser rates of delivery. We rejected an attempt by Gulf to amend its certificate in Opinion No. 692. It remains bound by its certificate. Section 16 is as supportive of Section 7(c), as in *Mesa* it was held to be supportive of Section 7(b).

Gulf argues that the refund formula must be modified. It objects to the Commission's use of prescribed areas or national rates to compute the alternative cost incurred through its failure to deliver, saying that Texas Eastern may have made up the deficiencies at lower prices during the relevant periods. On the other hand, Brooklyn Union argues that there is no evidence that Texas Eastern was able to replace fully the gas volumes that Gulf failed to deliver, and that the replacement volumes were obtained at the area or national rate, or even above, through emergency or supplemental supply purchases. Brooklyn Union also argues that every Mcf of curtailment by Texas Eastern, caused by Gulf's default, must be offset at the customer level by the production or acquisition of alternate gas supplies at costs far in excess of the pipeline rate. Further, PGW says that some of Texas Eastern's customers were forced to manufacture extremely high priced gas to replace their underdeliveries. New England makes a similar argument and asks for additional hearings, if necessary.

We prescribed the refund formula based on the difference between Gulf's contract rate and the area or national rate, as the best means of exercising the Commission's equitable discretion in this matter. Gulf contends that the measure of refunds, if any are ordered, should be the difference between the contract price and the market value of the gas at the time of the contract. Alternatively, they contend that the measure should be the difference between the contract price and the average cost of all gas supplied during the period of shortfall. We believe that Gulf's formula, or any other formula, indicating that the Commission may have overstated the amount of refunds due are incorrect. In strictest logic, the appropriate inquiry is, what is the effect of Gulf's failure to deliver? The steps necessary to adjust to Gulf's failure to deliver have no conceivable relation to the market value of gas some 8 to 12 years earlier, nor

to the average price of gas, the vast majority of which was already contracted for, and would have been delivered in any event.

Instead, the Commission has measured the refund obligation by the ceiling price of gas, which, by the Commission's actions, is the maximum price at which interstate gas is being regularly sold in the country. We believe that this is an appropriate measure of refunds to be made under the auspices of the Commission. The actual effect on each individual ultimate purchaser from Texas Eastern is, of course, a matter that will be developed in the proceedings for the distribution of the refund. See ordering paragraph (E), page 19 of Opinion 780. It is undoubtedly true that Texas Eastern offset some of Gulf's failure by purchase of gas at a variety of prices, ranging from, or perhaps below, the national rate, to higher prices under various special and emergency procedures (see SC-369). It is also true that customers purchased supplemental gas supplies (see, for example, Exhibit SC-32, Schedule 2) at quite high prices, but that same exhibit shows that considerable amounts of the shortfall simply were not replaced, at least at the distribution level. The matter of what values should be assigned to those volumes will be explored at the hearing on the distribution.

Finally, the ultimate consumers affected by the shortfalls, at least partially induced by Gulf's failure, themselves had a variety of responses ranging from purchases of additional supplies to conversion at additional expense, to simple curtailment or non-use. All these matters will be addressed in the proceeding for distribution of refunds. Should the Commission reach the conclusion in those proceedings that the ultimate amount of damage to all consumers was less than the refund paid by Gulf to Texas Eastern, the excess of funds would, of course, be remitted to Gulf. Should the Commission find, or

should any customer believe, that its damage was not adequately recompensed under the Commission's proceedings, the customer would, of course, be free to seek further relief in court, as the Commission indicates below in response to PGW's request for clarification.

Gulf makes other criticisms of the formula. It says the Commission must modify the provision to account for future price increases authorized by the contract. This is plainly covered by our order's reference to the "applicable contract price," which would include such increases. Gulf also asks for a provision permitting it to recoup refunds as part of the sale of volumes in excess of 625 MMcf per day. While our order provides that there should be no recoupment until all of the gas, except for the deficiency volumes, has been delivered, it is our opinion that allowing such early recoupment would encourage the delivery of volumes in excess of 625 MMcf per day if desired by Texas Eastern, and would be in the public interest. Therefore, if Gulf delivers, and Texas Eastern agrees to take, amounts over 625 MMcf per day, the excess shall reduce any cumulative deficiency of Gulf's performance. Such excess may be sold at a price per Mcf equal to the then applicable contract price, plus an amount equal to the refund Gulf has paid on an equivalent volume of gas. The vintage of gas whose refund shall be recouped shall be as agreed by Gulf and Texas Eastern.

Gulf also contends that future recovery of its refunds should include an amount equal to the loss of present value of such funds from the date or dates of payments by Gulf to Texas Eastern to the date of future recovery by Gulf. We disagree. Gulf's loss of the time value of the amounts refunded is simply a proper reflection of loss suffered by Texas Eastern's customers from Gulf's failure to deliver its contract or certificate volumes of gas. There is no reason why the customers should, in

effect, be required to pay interest on the money Gulf pays to make them whole until it finally completes the delivery of the contract volumes. The *Rayne Field* case, cited by Gulf, is not in point. There the court held that we should have taken the time value of money into account in prescribing a schedule of payments for the lease-sale gas, but that case did not involve underdeliveries such as we are here attempting to remedy.[1]

New England argues, on the other hand, that allowing Gulf to recoup its refund at the end of the contract period renders the entire refund a nullity. As noted, Gulf will lose the time value of the refund amount until recoupment. Further, if the refund represented compensation for ultimate failure to deliver gas rather than delay in delivering gas, Gulf would be relieved of its obligation to deliver the gas for which the refund represented compensation. Various of the customers have objected strenuously to any procedure which will relieve Gulf of its obligation, and we agree. If the refund provision were taken as full compensation for the non-delivered gas, Texas Eastern and its customers would have no claim on Gulf before Gulf had delivered 4.4 Tcf. They would then have to buy in the general market at a time when, under this order, Gulf is permitted to begin to recoup its refund while continuing to be obliged to deliver gas. Under our formula, Gulf will be delivering gas (in the late 1980's) at prices ranging from pre-1973 area rates to our current national rate ($1.42 plus 1¢ per quarter escalators), where Gulf would otherwise be under no obligation to deliver gas and the customers would in all likelihood be required to meet their needs at a market price almost certainly higher than those.

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[1] *Texas Eastern Transmission Corporation*, 42 FPC 376, Opinion No. 565 (1969); on rehearing 44 FPC 1079, Opinion No. 565-A (1970), remanded; *Public Service Commission* v. *F.P.C.*, —— F.2d —— (CADC, March 25, 1974); —— F.2d —— (CADC, August 27, 1975).

Gulf argues that there is no basis for payment of interest on the refund amounts because it has already lost the time value of money to the extent past deliveries to Texas Eastern have been less than the contract quantity. However, that result is only prospective. Gulf has already deprived Texas Eastern and its customers of the difference between the contract price and the costs imposed on them by non-delivery. Therefore, interest should run from the time the deliveries failed until compensation is paid.

Assuming that interest can be imposed, Gulf says interest shall only run from October 15, 1976, the date of issuance of the Commission's opinion, citing 28 U.S.C. § 1961, which provides that "Interest shall be allowed on any money judgment in a civil case recovered in a district court," and "such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by state law." There is no judgment here in a district court, and the action was taken to redress the disability suffered by Texas Eastern's customers. It was equitable in nature and carried out under the authority granted by the Natural Gas Act. In addition, there is nothing in the statute that presents the award of interest for periods before judgment in a proper case.

Gulf contends that the 7 percent rate of interest until October 10, 1974, and 9 percent thereafter is unreasonable and without basis because the Commission's Order Nos. 442 [2] and 513-A [3] apply to amounts collected subject to refund under rate filings for proposed rate increases. These orders were adopted to prescribe uniform rates of interest in rate suspension cases reflecting current conditions in the money market. There is no reason to adopt a different interest rate in this proceeding. The

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[2] Order No. 442, 46 FPC 1287 (1971).

[3] Order No. 513-A, —— FPC ——, July 14, 1976.

order of October 15, 1976, denies rehearing with respect to whether Order No. 513-A applies to final and non-appealable orders, a matter not involved here.

Texas Eastern contends that the Commission has erred in failing expressly to provide that in the event it is judicially determined that Texas Eastern cannot have both damages and gas that the public interest requires that the full volume of gas covered by the warranty contract be delivered. The Commission has here devised a procedure to insure both that Gulf will deliver the full contract volumes, as well as pay refunds in compensation of damage suffered. It is our intention that Gulf is required to deliver the full volume of 4.4 Tcf to Texas Eastern regardless of whether the provision for refund is ultimately upheld.

Further, Texas Eastern, with the support of New York, contends the Commission has erred in failing to adopt recommendations set out in New York's brief on exceptions before the ALJ, to wit:

1. Gulf will dedicate to Texas Eastern, by contracts to be entered into no later than 90 days after the Commission's opinion, all of the recoverable reserves on the leases that presently are attached or will be attached to fulfill its warranty obligations, including but not limited to the reserves on all leases or blocks described in Ex. Nos. SC-1, SC-9 and SC-19.

2. After the fulfillment of Gulf's obligation to sell 4.4 Tcf at 21 cents per Mcf, Gulf would be permitted to charge the then applicable nationwide rate, or any other rate which the Commission would otherwise lawfully authorize, provided that such rate shall be reduced to reflect a repayment to Texas Eastern and its customers, over a maximum period of five years, the total computed value of the damages as of that date assessed to Texas Eastern and its customers by Gulf's failure to meet its daily

volumetric obligations to Texas Eastern, plus interest thereon. (Such damages to be computed through subsequent proceedings if necessary.)

In our opinion it would not be appropriate or necessary to require that Gulf dedicate specific reserves to the fulfillment of its contract with Texas Eastern. The remedies that we have prescribed should bring about the required deliveries. This is a warranty contract, and there is no reason that its enforcement should involve the additional dedication of unspecified, but potentially large, amounts of gas to a particular purchaser.

New York's plan providing for refunds in the form of a rate reduction after the contract volumes have been delivered is defective in that it postpones the refund, possibly into the 1990's contrary to the public interest. It is the present and past customers and consumers who have suffered the effects of Gulf's underdeliveries. While deliveries at the 625 MMcf rate could fulfill the contract by about 1987, credits to customers in 1987 and beyond would not remedy the damage to present customers. A refund so long delayed may be largely illusory because of changes in the composition of Texas Eastern's customers, which may prevent refunds from reaching those to whom they are due. See *F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962). Thus, recompense should follow the damage as closely as practical.

In its motion and application for rehearing PGW requests clarification with respect to refunds. It notes the Commission's statement that "Gulf should make payments in order to leave Texas Eastern and the consumers in approximately the same economic position they would have been if they received the gas" and its further statement that "conditioning relief on actual proof of the myriad effects of Gulf's nondelivery could lead to endless proceedings." PGW says that where Texas Eastern was

unable to purchase replacement gas, some of its customers manufactured gas to replace these underdeliveries at a cost far in excess of the contract gas. PGW requests that the Commission clarify Opinion No. 780 so that PGW and other customer/distributors will not be precluded from recovering all damages which have resulted from Gulf's failure to meet its contract and certificate obligations. PGW notes particularly that there are several law suits pending in the United States District Court for the Eastern District of Pennsylvania which deal with damages arising from the warranty contract and certificate.

Gulf Oil Corporation filed an answer to PGW's motion on November 12, 1976.[4] It concludes that language of the Commission can neither enlarge or diminish the jurisdiction of the District Court. Further, it says, the allegations of additional damages are erroneous and the Commission has no jurisdiction to enter findings or conclusions on this matter.

In adopting Opinion No. 780 the Commission intended to provide for refunds based on an equitable estimate of damage to Texas Eastern and the consumers, and it therefore adopted the formula described above. This formula is designed to relieve Texas Eastern and the consumers of their additional costs caused by non-delivery of the Gulf gas, insofar as these costs may be generally related to Commission approved gas transactions. The formula may or may not cover all the effects of Gulf's non-delivery, and the Commission's decision to order the payment of refunds does not prevent PGW or other customers and distributing companies served through Texas Eastern's system from seeking additional relief in whatever forum they choose if they find that relief inadequate. Neither Opinion No. 780 nor this opinion preclude such action, nor does the Commission take any position on the merits of such proceedings.

[4] The answer is not timely under Section 1.12(c) of the Commission's Rules, but it is in the public interest that the answer be received. Further, Gulf alleges that it was not served with the motion until October 29, 1976.

Gulf says the general federal statute of limitations of five years, 28 U.S.C. § 2462, or state statutes of limitations, apply to the refunds prescribed here. The federal statute applies to "any civil fine, penalty, or forfeiture, pecuniary or otherwise." The refunds required in Opinion No. 780 do not fall in these categories.[5] It was designed not as a penalty but as a means of leaving Texas Eastern and the consumers in approximately the same position they would have been in if they had received the gas.

Gulf objects that the Commission is without statutory authority to review intrastate sales to ascertain whether the gas should be delivered to Texas Eastern, and thus makes some complaint about its obligation to report all new intrastate sale contracts (Opinion No. 780, Ordering Paragraph (M), p. 20). The Natural Gas Act, cited by Gulf, provides that the Commission may investigate any matter to determine whether any person has violated or is about to violate any provision of the Act or any rule, regulation or order thereunder. Arguments over the Commission's jurisdiction to regulate intrastate sales are premature. The steps the Commission might take to protect Texas Eastern and its customers would be governed by future circumstances, and must, of course, be within the Commission's jurisdiction. It is now only asking for information on intrastate sales, and no persuasive objection has been made to this order.

[5] It was held under a predecessor statute that "penalty or forfeiture" does not include liability for reparations since the liability was not punitive but remedial. *Meeker & Co.* v. *Lehigh Valley R.R.*, 236 U.S. 412, 423 (1915).

ARBITRATION

Gulf continues to argue that the Commission erred in not deferring its decision in this proceeding until the Commsision has received the arbitrators' decision on the matters submitted to arbitration. In Opinion No. 780 the Commission said that the matters subject to arbitration —the effect of designating a delivery point, the effect of a mistake as to gas reserves, and the effect of a moratorium on offshore leases—are matters peculiarly within the Commission's authority. To the extent that these matters are purely questions of contract law, a court upon review of our decision might be of the opinion that it could decide these questions as well as we can. In appropriate instances we might defer a decision on a contractual matter that is before a court. Here, however, the question is directly before us, and there is nothing in the Federal Arbitration Act, 9 U.S.C. §§ 1-14, requiring an administrative agency to defer to arbitration. The purpose of arbitration is to settle disputes, but here there is also involved the public interest under the Natural Gas Act. In *William E. Arnold Co.* v. *Carpenters District Council*, 417 U.S. 12 (1974), cited by Gulf, the Court approved the policy of the NLRB to refrain from exercising jurisdiction over an action in respect to a disputed conduct, arguably both an unfair labor practice and a contract violation, where the parties had voluntarily established a binding settlement procedure. However, the determination of jurisdictional disputes may be settled by voluntary action under the National Labor Relations Act, 29 U.S.C. § 160(K). Thus, the statutory context was different in *Arnold* than in the present case.

Gulf further complains that the Commission ignored its approval of the contract when it certificated the sale in its December 19, 1963, order. The arbitration provision is designed to settle disputes between the parties. This may be useful to them in private litigation, but

this in no way prevents the Commission from proceeding expeditiously to deciding the issues where its responsibilities are involved.

Gulf also contends that the Commission has erred on the merits of the matters that have been submitted to arbitration. Thus, it says that the parties, contrary to the Commission's holding, intended the gas to be delivered only from leases in the vicinity of the contract delivery points. It notes references in the contract to the seller's ownership of leaseholds and its supply of gas available for delivery near Venice, Louisiana. Further, Gulf says, it would be absurd to construe the contract to reflect an intention by the parties that Gulf is obligated to deliver gas to Texas Eastern regardless of the cost of delivery. As noted in Opinion No. 780, there is no limitation on the location of leases used for the purposes of the contract. A recital of where some of the gas may come from or where it may be delivered does not change the unconditional nature of the contract. The contract says that the "Seller warrants and agrees that there will be provided under the terms and provisions of this agreement a quantity of gas sufficient to enable Seller to have available for delivery" 125 percent of the DCQ.

Gulf discusses the law of contracts and the application of specific performance where deliveries from remote areas become excessively costly. We are not here requiring such costly deliveries, nor ordering specific performance of a private contract. We are requiring that Gulf carry out its certificate obligation to deliver amounts requested by Texas Eastern, up to 625 MMcf per day as set forth in its contract. If it does not carry out such obligation, we shall seek enforcement of our order in an appropriate court.

Gulf similarly argues that its mistake with regard to the West Delta Block 27 reserves excuses delivery ob-

ligations to the extent affected by the mistake. It says this is a case for equitable relief from failure to perform a contract because of a mutual mistake of the parties. Again, this was a warranty contract; the gas did not have to come from any particular field; and Gulf had undertaken a certificate obligation to serve the interstate market.

Also, Gulf continues to argue that the failure of the Department of the Interior to hold regular offshore lease sales from 1962 to 1972 was an act of *force majeure* under the contract. Gulf notes the provision in Article X of the contract that *force majeure* shall include in those instances where either party is required to obtain "servitudes" to enable such party to fulfill its obligation" "the inability of such party to acquire . . . at reasonable cost and after the exercise of reasonable diligence, such servitudes. . . ." It notes also that leases are servitudes under Louisiana law. The contract does not contemplate the acquisition of any given leases, or any particular schedule of future offerings. The contract is not limited to any particular area, so that the Interior Department's failure to lease at a rate satisfactory to Gulf is not an instance of *force majeure*.[6] We note in this connection that Gulf's witness sets forth in the record the volumes delivered and the *force majeure* volumes on an average daily basis thus (Exh. SC-3):

[6] We note that the original certificate order, 30 FPC 1559 (1963) stated that the contract price contemplated that 85% of the subject gas would come from within Louisiana taxing jurisdiction (*id.* at 1561, n. 2).

	Deliveries	Force Majeure	Total Available
1964 (2 mos)	153	—	153
1965	168	2	170
1966	310	—	310
1967	455	—	455
1968	550	—	550
1969	573	—	573
1970	596	12	608
1971	558	20	578
1972	604	9	613
1973	509	44	553
1974	391	36	427
1975 (9 mos)	366	46	412

It is apparent from these figures that Gulf has computed *force majeure* on a basis other than a blanket excuse for its failure to deliver, and we would assume that such figures contain no component attributable to Interior Department leasing policies. If, however, any of these alleged volumes are so attributable, they should be eliminated in computing the refund set forth in paragraph (B) of Opinion No. 780. When such filing is made, other parties are, of course, free to make comments as to its accuracy and adherence to the contract and to the Commission's order.

Gulf objects to the Commission's statement that it declined to buy Mobil's share in Grand Isle Block 94 and 95. There is material in the record indicating that Gulf was unwilling to suffer the substantial loss which would be incurred (Ex SC-27, p. 7). However, as Gulf points out, the record also indicates that there was little chance that Mobil would have agreed to the sale of its gas (Tr. SC-282). The record shows, in any case, that it was Gulf's policy to purchase gas only where economically advantageous (Tr. SC-155).

The Commission further finds:

The assignments of error and grounds for rehearing of Opinion No. 780 and order in the applications for

rehearing filed by Gulf, Texas Eastern, Brooklyn Union, New York and New England present no facts or legal principles that would warrant any change in or modification of Opinion No. 780 as supplemented by the above discussion except as provided below:

The Commission orders:

(A) The applications for rehearing filed by Gulf, Texas Eastern, Brooklyn Union, New York and New England are denied except as provided below. PWG's request for clarification in its motion and application for rehearing is granted as provided below.

(B) Ordering Clause (D) in Opinion No. 780 is modified to provide that when Gulf delivers gas to Texas Eastern in an amount greater than 625 MMcf in any one day at Texas Eastern's request, the price shall be the contract price plus a recoupment of an amount of refund previously paid on an equivalent volume of gas, as agreed between Gulf and Texas Eastern.

(C) The refund required in Opinion No. 780 and in Ordering Paragraph (B) and flowed through to Texas Eastern's customers by Ordering Paragraph (E) does not preclude any of the customers and distributors served through Texas Eastern's system from seeking further compensation outside the Commission in mitigation of damages allegedly not compensated by the Commission's action herein.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

APPENDIX F

NATURAL GAS ACT

[PUBLIC—NO. 688—75TH CONGRESS]

[CHAPTER 556—3D SESSION]

[H. R. 6586]

* * * *

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SECTION 4

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges

for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full

hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

* * * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SECTION 7

* * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such

facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in

subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

* * * *

ADMINISTRATION POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SECTION 16

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and re-

scind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such as rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

* * * *

REHEARING: COURT REVIEW OF ORDERS

SECTION 19

* * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the

application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as pro-

vided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

* * * *

FEDERAL ARBITRATION ACT

9 U.S.C. § 1

"Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

July 30, 1947, c. 392, 61 Stat. 670.

9 U.S.C. § 2

Validity, irrevocability, and enforcement of Agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

9 U.S.C. § 3

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issued involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

9 U.S.C. § 4

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in

admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such an agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

* * * *

ADMINISTRATIVE PROCEDURE ACT

* * * *

5 U.S.C. § 556

Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination

as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386; Pub.L. 94-409, § 4(c), Sept. 13, 1976, 90 Stat. 1247.

* * * *

Supreme Court, U.S.
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No. 77-596

In the Supreme Court of the United States

OCTOBER TERM, 1977

GULF OIL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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The Solicitor General submits this brief on behalf of the Federal Energy Regulatory Commission.[1]

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[1]On September 30, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Pub. L. 95-91, 91 Stat. 565, and Executive Order 12009, 42 Fed. Reg. 46267, the Federal Power Commission ceased to exist. Most of its functions and regulatory responsibilities were transferred to the Federal Energy Regulatory Commission, which, as an independent commission within the Department of Energy, was activated on October 1, 1977. The "savings provisions" of Section 705 of the DOE Act, 91 Stat. 606-607, provide for the substitution of the Federal Energy Regulatory Commission for the Federal Power Commission in pending litigation such as this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 563 F. 2d 588. The Federal Power Commission's Opinions No. 780 and 780-A (Pet. Apps. D and E), issued October 15, 1976, and December 9, 1976, are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1977 (Pet. App. C). Gulf's petition for rehearing was denied on September 26, 1977 (Pet. App. B). Gulf's petition for a writ of certiorari was filed on October 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTES INVOLVED

Sections 4, 7(b), 7(c), 7(e), 16, and 19(b) of the Natural Gas Act, 52 Stat. 821, 822, 824, 830, 831 , as amended, 15 U.S.C. 717(c), 717f(b), 717f(c), 717f(e), 717o, and 717r(b), are set forth at Pet. App. F, pp. 117a-124a. Sections 1, 2, 3, and 4 of the Federal Arbitration Act, 9 U.S.C. 1, 2, 3, and 4, are set forth at Pet. App. F, pp. 124a-127a.

QUESTIONS PRESENTED

1. Whether the Federal Power Commission had authority to determine petitioner's obligations to deliver natural gas to an interstate customer under a certificate of public convenience and necessity issued pursuant to Section 7(c) of the Natural Gas Act before a board of arbitrators had determined petitioner's obligations under the related gas sales contract.

2. Whether the Commission had authority under the Natural Gas Act to order petitioner to remedy its breach

of its certificate obligations by paying to its interstate purchaser, for past delivery shortfalls, an amount that petitioner will be able to recoup, pursuant to the Commission's order, as it completes performance of its delivery obligations.

3. Whether the Commission correctly determined petitioner's delivery obligations under the certificate.

STATEMENT

In 1963 petitioner Gulf Oil Corporation (Gulf) and Texas Eastern Transmission Corporation (Texas Eastern) entered into a "Precedent Agreement" whereby they agreed to enter into a gas sales contract, on terms specified in the Precedent Agreement, upon the receipt of certificates from the Federal Power Commission under Section 7(c) of the Natural Gas Act authorizing the sale called for in the agreement and the contract.

The Precedent Agreement, and subsequently the sales contract (hereinafter collectively referred to as the "contract"), specified a "Daily Contract Quantity" of 500,000 Mcf (thousand cubic feet) of gas per day. The contract stated that Gulf (Pet. App. A, p. 49a):

> warrants and agrees that there will be provided under the terms and provisions of this Agreement a quantity of gas sufficient to enable [Gulf] to have available for delivery hereunder on any day or days a volume not less than one hundred twenty-five per cent (125%) of the Daily Contract Quantity * * *.

Correspondingly, Texas Eastern had the right "to purchase from [Gulf] hereunder at any time" quantities of gas up to 125% of the Daily Contract Quantity (*i.e.*, 625,000 Mcf). Texas Eastern, in turn, agreed to purchase, or pay for if not taken, "a quantity of gas equal to eighty percent (80%) of * * * the * * * Daily Contract Quantity

* * *." The contract further provided that it would remain in force for 26 years or until Gulf had delivered 4.4 trillion cubic feet (Tcf) to Texas Eastern, whichever occurred first (Pet. App. A, pp. 8a-10a, 49a-52a). The contract fixed a price for the gas sales which has been less than the Commission's area rate (see, *e.g.*, Pet. App. A, p. 29a).

The preamble to the contract recited that Gulf owned or controlled oil and gas properties in southern Lousiana, but the contract provisions did not limit the rights or obligations of the parties to those properties (see Pet. App. A, pp. 48a-52a). The contract also provided for arbitration of "[a]ny dispute arising between Seller and Buyer out of this Agreement * * *" (Pet. App. A, p. 52a).

Gulf applied to the Commission for a certificate authorizing the sale called for in the contract, which was attached to the application. In the application, Gulf emphasized that "the agreement * * * does not commit or dedicate to the contract any specific gas producing leases or fields, and no specific commitment or dedication is intended" (Pet. App. A, p. 16a). In December 1963, the Commission issued to Gulf a certificate for the sale of gas as proposed in the application (Pet. App. D, pp. 69a, 89a).[2]

---

[2]This certificate, by specifying the sale of a finite quantity of gas for a finite period, differs from the kind of certificates considered in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, and *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170, which authorized sales from specified leaseholds or properties without limit of time. As this Court held, those certificates obligated the holder to continue sales from the designated properties until the Commission permitted abandonment under Section 7(b) of the Act, 15 U.S.C. 717f(b), notwithstanding that the sales were pursuant to fixed-term contracts. Here the Commission's certificate related to a specified quantity of gas rather than to specified gas-producing properties.

Within a few years, Gulf discovered that it had overestimated the reserves of gas underlying the property from which it had expected to satisfy the Texas Eastern contract. In 1971 Gulf and Texas Eastern amended their contract to provide, among other things, for an increase in the sales price and for dedication of specified properties to performance of the contract; Gulf applied to the Commission to amend the certificate accordingly (Pet. App. D, pp. 70a-71a). The Commission denied the application on the ground that Gulf's contractual warranty was unconditional and that there was "no basis for relieving Gulf of its errors at the expense of Texas Eastern's ratepayers" (Pet. App. D, p. 71a). The Commission also found that Gulf had not demonstrated its inability to perform its contract obligations (*ibid.*). Gulf did not seek review of that order.

Since 1971 Texas Eastern has demanded 625,000 Mcf per day from Gulf on all but a few occasions. Gulf's deliveries, however, have been substantially less. In November 1975, the Commission ordered Gulf to show cause why it should not be required to satisfy its certificate obligations. After a hearing, the Commission found that Gulf was in substantial breach of its certificate obligations (Pet. App. D, pp. 67a-93a). The Commission rejected Gulf's contentions that its obligations under its contract, and thus under its certificate, were limited to actual reserves underlying its properties in southern Louisiana; that its maximum contract obligation was only 500,000 Mcf per day; that its failure to perform was excused by mutual mistake of fact, commercial impracticability, and *force majeure* (the Department of the Interior's allegedly unexpected moratorium on offshore lease sales between 1962 and 1972); and that in any event the Commission was precluded from determining Gulf's certificate obligations until its contract obligations had been determined by the arbitration process that Gulf had invoked

under the contract. The Commission concluded, as it had in 1971, that Gulf's contract and certificate unconditionally obligated it to deliver 625,000 Mcf per day and that Gulf was not excused from this obligation because performance would be more expensive than Gulf had originally anticipated (Pet. App. D, pp. 81a-86a). The Commission also noted that since 1971, when it denied Gulf's application to amend the certificate, Gulf had commenced approximately 25 intrastate sales of natural gas (Pet. App. D, p. 77a).

Having found that Gulf had not complied with its certificate obligations, the Commission ordered Gulf to commence delivering 625,000 Mcf per day to Texas Eastern on December 15, 1976, unless Texas Eastern demanded less (Pet. App. D, p. 89a). In addition, with respect to Gulf's prior shortfalls on its delivery obligations, the Commission ordered Gulf to "refund" to Texas Eastern (for further refund to Texas Eastern's customers) an amount of money equal to the total prior shortfall multiplied by the difference between the relevant contract price and the governing Commission area rate, on the ground that this "measure of payment is an equitable estimate of damage to the customers" (Pet. App. D, p. 79a). The Commission also provided, however, that Gulf could recoup the amount it paid in refunds. Thus, if Gulf paid refunds with respect to 300 billion cubic feet (Bcf) of gas that it had failed to deliver, Gulf would be permitted, as it delivered that 300 Bcf of previous under delivery, to charge Texas Eastern for that gas an amount in excess of the contract price that would equal the amount of refunds Gulf had paid (see Pet. App. E, p. 105a). In short, as the court of appeals noted (Pet. App. A, p. 37a), the effect of the "refund" order was merely to deprive Gulf of the present value of the money while

providing some relief to Texas Eastern and its customers for Gulf's breach of its obligations. The order was "nothing more than a temporary performance bond made necessary by Gulf's failure to fulfill the terms of its certificate" (*ibid.*).

Gulf sought review in the court of appeals, attacking the Commission's determination of its contract and certificate obligations, the right of the Commission to decide those issues before the arbitrators did, and the authority of the Commission to order the refund relief. Other parties sought review and generally contended that the Commission's findings and order with respect to Gulf were too lenient. The court of appeals, in a thorough opinion, affirmed the Commission in all respects (Pet. App. A, pp. 1a-47a). Judge Aldisert dissented on the one ground that, while he agreed with the Commission's construction of Gulf's delivery obligations, he believed the Commission should have deferred its decision until after the arbitration invoked under the contract (Pet. App. A, pp. 53a-58a).

ARGUMENT

1. Gulf contends, first, that the court of appeals erred in upholding the Commission's refusal to defer its decision on Gulf's obligations until after the board of arbitrators invoked by Gulf under the contract made their decision (Pet. 12-20). The contention is without merit.

It is the Commission's responsibility under the Natural Gas Act to issue, and ensure compliance with, the certificates of public convenience and necessity provided for by Section 7(c) of the Act. In this case the certificate issued by the Commission incorporated by reference the terms of the gas sales contract. But it is the certificate, not the contract, that establishes and defines Gulf's obligations under the Act (see *Sunray Mid-Continent Oil*

Co. v. *Federal Power Commission*, 364 U.S. 137).[3] And it is the Commission's statutory responsibility to determine, subject to judicial review, the scope of the obligations imposed by the certificate.

Accordingly, the Commission would not be bound by any decision of the arbitrators concerning the meaning of the contract or excuses for non-performance. Gulf does not appear to deny this,[4] but contends that "the Commission should be bound by [the parties'] agreement as to the *procedure* for the initial resolution of interpretation conflicts" (Pet. 19, quoting Judge Aldisert's dissent, Pet. App. A, pp. 57a-58a). Since the arbitrators' decision would have no controlling effect on the Commission, acceptance of Gulf's contention would serve mainly the purpose of delay. It would also effectively divest the Commission of its statutory functions and responsibilities. Here, in the face of what the court of appeals called a "massive" and "blatant" default by Gulf on its certificate obligations to interstate customers (Pet. App. A, p. 38a), it would debilitate the Commission to conclude that it cannot enforce the Act because the

[3]Gulf cites *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338, for the general proposition that the Natural Gas Act "evinces no purpose to abrogate private rate contracts as such * * *" (Pet. 14). But as this Court in *Sunray* later explained (364 U.S. at 154-156), *United Gas Pipe Line* merely recognized that the imposition of regulation under the Natural Gas Act did not release parties from their private contracts. A party's responsibilities under the Act, which derive from its certificate, may coexist with its obligations under a private contract. But the Act is paramount; in case of conflict (for example, when contract prices exceed regulated rates), contract terms must yield to the Act.

[4]Gulf disclaims concurrence with the proposition (see Pet. 19, n. 14), but does not squarely challenge it (see *id.* at 19-20).

parties have agreed among themselves to some other method of dispute resolution.[5]

Gulf's reliance on cases reaffirming the principles of the Federal Arbitration Act (Pet. 16-17) is misplaced. None of those cases involve a party's obligation under a regulatory statute. The Arbitration Act was not intended to divest an agency such as the Commission of its regulatory responsibilities to the public.[6]

2. Gulf claims that the Commission had no authority under the Natural Gas Act to order it to pay "refunds" with respect to its defaults (Pet. 20-26). Although the remedy ordered in this case was somewhat novel, the court of appeals correctly found that it was a reasonable response to petitioner's substantial defaults and well

[5]The fact that the arbitration provision was part of the contract that the certificate incorporated by reference does not support a contrary conclusion. As the Commission explained (Pet. App. E, pp. 112-113), the certificate defined Gulf's delivery obligations by reference to the delivery obligations of the contract, but did not modify or alter the procedures by which the certificate obligation would be determined and enforced. Indeed, it is doubtful that the Commission could by its certificate delegate its responsibilities under the Act to some other decision-makers or decision-making process chosen by private parties.

[6]*William E. Arnold Co.* v. *Carpenters District Council*, 417 U.S. 12, relied on by Gulf (Pet. 16), is not to the contrary. There the Court emphasized that when conduct constitutes both an unfair labor practice and a breach of a collective bargaining agreement, the authority of the National Labor Relations Board is not exclusive; the parties may still seek enforcement of their agreement in court or before arbitrators, in keeping with the basic purpose of the National Labor Relations Act to promote industrial peace. 417 U.S. at 16. The Commission, however, does have the exclusive authority to enforce certificate obligations under the Natural Gas Act. Moreover, even under the labor laws, this Court has recognized that the Board's ruling on an issue must take precedence over an arbitrator's. *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 271.

within the Commission's conceded power to enforce compliance with its certificates (Pet. App. A, pp. 31a-39a).

In the *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-777, this Court stated the general principle that "the Commission's broad responsibilities * * * demand a generous construction of its statutory authority"; on the issue in that case, the Court refused to "conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted." In this case, the Commission was faced with a substantial breach of Gulf's certificate obligations to deliver gas to interstate customers. To provide some remedy for that breach and to ensure future compliance, the Commission devised what the court below accurately characterized as "a procedure which will ultimately result in a loss to Gulf of nothing more than the time value of the money" (Pet. App. A, p. 37a). Under the circumstances the remedy fashioned was necessary, proper, and reasonably tailored to effectuate the purposes of the Act. See *Mesa Petroleum Co.* v. *Federal Power Commission*, 441 F. 2d 182 (C.A. 5), affirming a refund order in similar circumstances.[7]

3. Gulf also contends that the Commission erred in determining that its delivery obligations under the certificate and the contract were 625,000 Mcf per day (Pet. 27-30). Contrary to Gulf's claim, this is an issue that

[7]*Mobil Oil Company* v. *Federal Power Commission*, 483 F. 2d 1238 (C.A. D.C.), relied on by Gulf (Pet. 24), involved the question whether the Commission could establish rates without utilizing procedures contemplated by the Act. The court's conclusion that it could not has no bearing on the issue of the scope of the Commission's power to enforce its certificates and to remedy violations of the Act.

turns on the language and circumstances of the particular certificate and contract. It is not a question of general importance warranting this Court's review. In any event, the court below analyzed the contract thoroughly and was unanimous, and correct, in affirming the Commission's determination.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

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JANUARY 1978.

[8]Gulf's contention appears to be that even though Gulf unconditionally "warrant[ed]" to deliver 625,000 Mcf "on any day," and Texas Eastern had the corresponding right to purchase 625,000 Mcf per day "at any time," these maximum delivery obligations were only intended to apply on certain "peak days" (Pet. 27-30). Gulf does not explain what constitutes a "peak day," or why every day on which Texas Eastern demands 625,000 Mcf is not a "peak day." Gulf does not raise in its petition the other asserted excuses for its default that it raised before the Commission and the court below, such as commercial impracticability and mutual mistake of fact.

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TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT TEXAS EASTERN TRANSMISSION CORPORATION IN OPPOSITION

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IN THE

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REASONS FOR DENYING THE WRIT

The Third Circuit correctly decided that the Federal Power Commission was not required to defer to a private arbitration board in determining issues which go to the heart of Gulf's obligation under its contract with Texas Eastern and which directly and substantially affect the public interest. Beyond that, the warranty-type contract involved here is unique. Very few were made.[1] It is unlikely that any more commitments of this nature will be made by producers in the future.

[1] Unlike the usual gas purchase contract, which dedicates gas from a specific source of supply, Gulf undertook in the warranty agreement to make the contract volumes available to Texas Eastern without regard to any particular supply source.

For a period of several months before the Commission issued the show cause order which set this proceeding in motion, Gulf had failed to deliver the contract volumes to Texas Eastern. Following the initiation by the Commission of these proceedings, Gulf purported to invoke the arbitration cause as a device to limit the unconditional nature of the delivery obligation as stated in the contract (III. App. 1286-87). Thereafter, Gulf expanded the "issues" which it was undertaking to submit to arbitration to include an issue which would have excused its non-performance (III App. 1610-12).

Gulf's summary of the "issues" does not do justice to them. Specifically, Gulf would have a private arbitration board decide:

> (1) Whether Gulf's obligation for delivery of gas to Texas Eastern under the 1964 Gas Contract is limited to gas produced in the vicinity of the delivery point as set out in Article III of such contract and secondary delivery points as established in amendments to the contract, taking into consideration the price provided by the contract, the volume of gas involved, and the cost of delivering such gas; and whether, in light of such obligation, that when such price, volume and cost are so taken into account, Gulf is obligated under such contract to deliver to Texas Eastern at such delivery points (or other points that may be added in subsequent amendments to the contract) only such gas as may be produced by or for the account of Gulf in sufficient quantities and within sufficient proximity to Texas Eastern's system to make it commercially practicable, when the volume of gas is compared with the cost of delivering such gas, for the cost to be incurred by Gulf;
>
> (2) Whether Gulf is, by reason of the mistake as to reserves in West Delta Block 27, the natural gas shortage, and other matters set forth in Exhibit "A" attached hereto, excused from delivering the daily contract quantity (or the maximum daily quantity

> when called for) as provided in the subject Gas Contract.
>
> (3) Whether the failure of the Department of the Interior to hold regular general offshore Louisiana lease sales from March, 1962, to March, 1972, constituted an act of force majeure within the provisions of Article X of the contract and operates to relieve Gulf of its obligations to deliver the contract quantities to the extent of Gulf's inability to do so from the date Gulf was unable to deliver such quantities until such time as Gulf, by the exercise of due diligence, can deliver to Texas Eastern such contract quantities and, further, whether Gulf's letters of March 17, 1972, and February 24, 1976, constituted timely notice to Texas Eastern of Gulf's claim of such force majeure. (III App. 1611-12).

Thus, what Gulf has called "arbitration issues" in this matter are in fact issues which either undertake to excuse past failure to perform or, by interpretation, to rewrite the terms of the contract to limit Gulf's future performance obligations.

Under the warranty contract, Gulf is to deliver approximately 4.4 Tcf of gas, at a rate of up to 625,000 Mcf per day when called upon to do so by Texas Eastern. These substantial volumes are clearly significant to Texas Eastern, its customers, and the consumers served by them. Texas Eastern is currently curtailing deliveries to its customers because of shortages of gas supplies. Any limitation of Gulf's delivery obligation would detrimentally affect Texas Eastern's ability to deliver gas to its customers on a daily basis. Further, these substantial volumes are being sold to Texas Eastern and its customers at a comparatively low price. It cannot, therefore, be disputed that Gulf's obligations under the warranty contract directly and substantially affect the public interest. They do not involve merely private contractual matters. Under the law as

established in *Wilko* v. *Swan*, 346 U.S. 427 (1953), such issues are not properly arbitrable. *See e.g., Cobb* v. *Lewis*, 488 F.2d 41, 47 (5th Cir. 1974) (antitrust claims); *Beckman Instruments, Inc.* v. *Technical Development Corp.*, 433 F.2d 55, 62-63 (7th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971) (patent claims).[2]

While Texas Eastern does not agree with the court below in all respects, Texas Eastern submits that the court was clearly correct in affirming the Commission's refusal to defer to arbitration.

[2] *See also In Re Kramer & Uchitelle, Inc.*, 288 N.Y. 467, 43 N.E.2d 493 (Ct. App. 1942) (Office of Price Administration Order); *Board of Education, Union Free School Dist. No. 9, Town of Islip, Suffolk County, West Islip, N. Y.* v. *West Islip Teachers Ass'n*, 328 N.Y.S.2d 266 (S. Ct. 1972) (Regulation of Salary and Fringe Benefits By Federal Agency); *cf. Wells* v. *Delta Airlines, Inc.* 398 *F. Supp.* 384 (E.D. Penn, 1975), *aff'd* 535 F.2d 1248 (3d Cir. 1976) (CAB Regulation of Airline Mergers) and *Nursing Home Local 1115* v. *Hialeah Convelescent Home, Inc.*, 348 F. Supp. 405, 411 (S.D. Fla. 1972) (Federal Wage and Price Control Programs).

CONCLUSION

Gulf Oil Corporation's Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-596

GULF OIL CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MEMORANDUM FOR INTERVENOR PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN OPPOSITION

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MEMORANDUM FOR INTERVENOR PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN OPPOSITION

1. Petitioner seeks review of the Court of Appeals' Decision (App. A, pp. 1a-58a) affirming the Decision of the Federal Power Commission (App. D, pp. 67a-94a). The decision below is not in conflict with any decision of this Court or any other Court of Appeals.

2. Public Service Electric and Gas Company (Public Service) is a public utility operating company engaged among other things in the purchase, manufacture and dis-

tribution of gas. It purchases natural gas from three interstate pipeline companies and serves gas to over 1,290,000 customers in an area having a population in excess of 4,900,000 persons and which extends from the Hudson River opposite New York City to the Delaware River at Trenton and thence to Camden, New Jersey. Texas Eastern Transmission Corporation (Texas Eastern) is a major supplier of Public Service and Petitioner Gulf Oil Corporation (Gulf) provides Texas Eastern a large portion of its supply under the contract and certificate of public convenience and necessity under review herein.

3. Petitioner seeks to have this Court review its daily delivery obligations under its contract and certificate claiming that such obligations are matters of general importance (Gulf Br. p. 27). In the particular case under review herein, Public Service submits that the delivery obligations are unique in the gas industry and are not matters of general importance warranting review by this Court. Unlike the normal gas purchase contract, Gulf gave its corporate warranty to deliver specified volumes of gas to Texas Eastern. In the normal gas purchase agreement, the Seller dedicates the reserves in a particular field to the contract, whatever those reserves may ultimately turn out to be. In this unique type of contract, the Court of Appeals used its reasoned judgment to analyze all of the terms of the contract and properly affirmed the Federal Power Commission's (FPC) rulings regarding Gulf's delivery obligations. (App. A, pp. 8a-11a).

4. Petitioner has gone to great lengths to have the Courts narrowly interpret its delivery obligations despite the fact that under any possible interpretation of the contract obligation Gulf has been in default. Even assuming the daily delivery obligation to be 500,000 MCF as Gulf claims, the record indicates that Gulf was in de-

fault of this obligation from 1974 through 1976. While Gulf contends that it does not have an obligation to deliver the maximum quantity of 625,000 MCF every day, the *record* indicates that Gulf has not made deliveries at this level on any day for at least several years. Therefore, the question which Gulf seeks to have this Court review is not whether or not it has been in default but only the degree to which it has been in default. This narrow issue of contract interpretation has already been thoroughly examined by the FPC and by the Court of Appeals which affirmed the FPC's rulings.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF INTERVENOR THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

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TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF INTERVENOR THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

The Public Service Commission of the State of New York ("New York"), an intervenor both in the court below and in the proceedings before the Commission, opposes, for the reasons set forth below, the petition for certiorari filed herein by the Gulf Oil Corporation ("Gulf Oil").

New York is a regulatory body established by the laws of New York State having jurisdiction, *inter alia*, over the sale of natural gas at retail within the state. As such it is directly interested in the actions of the Federal Power Commission (now the Federal Energy Regulatory Commission) in certificating the sale of natural gas by independent producers to the interstate

pipelines serving New York distributors, and in proceedings to enforce such certificate obligations. In this capacity New York participated both in the proceedings which led to the initial certification of Gulf Oil's warranty sale to Texas Eastern Transmission Corporation ("Texas Eastern") and in the several enforcement proceedings culminating in the commission's opinions and orders under review in this case. New York also intervened in support of the Commission in the proceedings in the Third Circuit Court of Appeals from which certiorari is sought.

REASONS FOR DENYING THE WRIT

At issue in the Third Circuit's decision in this case was the validity of the Federal Power Commission's interpretation of a gas purchase contract between Gulf Oil and Texas Eastern. Under this contract Gulf Oil warranted that during the contract term it would

> . . .have available for delivery hereunder on any day or days a volume not less than one hundred twenty five per cent (125%) of the Daily Contract Quantity in effect from time to time. . .(I App., p. 18)

Gulf Oil's warranty differed greatly from the vast majority of gas purchase contracts which have been certificated by the Commission in that it was not dependent upon gas reserves from any particular leasehold interest or interests. The warranty to have available a daily amount of gas was limited only by total delivery of approximately 4.4 Tcf (trillion cubic feet) required by the contract. This warranty provision was justified by Gulf Oil and Texas Eastern for the economic and operating advantages it provided to both parties. (I App., pp. 138-139). While a warranty, such as Gulf Oil's, which was not tied to a specific leasehold interest was rare when natural gas was considered plentiful, such a contract is unknown today when natural gas is scarce. Thus, interpretation of such warranty contracts cannot be expected to be a recurring question before the Federal Energy Regulatory Commission or the courts.

I. The Provisions Of The Natural Gas Act Protecting Gas Consumers Override The Policy Behind The Federal Arbitration Act

No conflict exists between the policy of the Federal Aribtration Act and the Third Circuit's decision upholding the Commission's right to determine the extent of Gulf Oil's duties under the warranty contract with Texas Eastern. Where the federal policy favoring arbitration conflicts with a federal policy favoring protection of a class of consumers, this Court has held that the policy emanating from the protective legislation should prevail. *Wilko v. Swan*, 346 U.S. 427 (1953).[1] The Third Circuit's and the Commission's decision in this case are based on the authority of the Natural Gas Act, the primary purpose of which is to protect consumers from exploitation by the natural gas companies. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). The ultimate consumers on Texas Eastern's system will bear all losses resulting from Gulf Oil's breach of contractual duty. These losses can result from the higher prices paid for gas or alternative energy supplies used to make up the deficiencies, and from the disruption of service if alternative supplies cannot be found.

In granting the certificate approving the contract between Gulf Oil and Texas Eastern, the Commission relied heavily on its

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[1]Reliance on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), as contrary is misplaced. The majority in *Scherk* found that because the contract "was a truly international agreement. . .[it] involves considerations and policies significantly different from those found controlling in *Wilko*." (417 U.S. 515.) Arbitration was thus favored in *Scherk* because of potential conflict of laws and comity problems which could arise from private litigation. (417 U.S. 516-520.) The instant case involves solely the laws of the United States, in particular those of national energy policy. While *William E. Arnold v. Carpenters*, 417 U.S. 12 (1974), involves matters of United States law, its application is inapposite here because the National Labor Relations Act views labor disputes as matters of private concern which should, to the extent possible, be resolved by arbitration. (417 U.S. 15-18.) Here, the issue is not confined to resolution of disputes between the parties to the contract but directly involves optimum service to gas consumers dependent upon Texas Eastern for their gas supply.

finding that the public interest would be served by a guaranteed supply of natural gas on a daily basis at a set price. (I App., pp. 136-137.) Abrogation of its contractual duties meant Gulf Oil was no longer meeting the public interest obligations imposed upon it by the certificate. Because the heart of the contract between Gulf Oil and Texas Eastern matched the public interest considerations which underlay its certification order[2], the Commission was justified in exercising its authority under the Natural Gas Act, and was not required to wait for the possible results of private arbitration[3] before taking the steps available to it under the Natural Gas Act to protect gas consumers.

II. Ordering Refunds Was A Proper Exercise Of The Commission's Authority

The Third Circuit upheld the commission's action in ordering refunds by Gulf Oil "for failure to make full deliveries in the past." (I App., p. 291.) Under the Commission's plan, Gulf Oil would return immediately an amount calculated by multiplying the difference between the contract price and the applicable area or nationwide rate by the volumes defaulted during each applicable rate vintage. (I App. 290-202.) This calculation would apply also to any future defaults by Gulf Oil. This amount would be recouped by Gulf Oil at the time total deliveries equal the total contract volumes (4.4 Tcf) less the defaulted volumes. At that point, Gulf Oil may add a surcharge to recover the vintaged amounts paid previously. (*Ibid.*) Assuming Gulf Oil delivered the entire contract volumes to Texas Eastern, it would recoup the total contract price for which it bargained. Texas Eastern's

[2]The fact that more than a dispute between the parties to the contract was involved is demonstrated by the Commission action in Opinion No. 692 (I App., pp. 118-147) rejecting the original settlement concurred in by both Gulf and Texas Eastern which would have resulted in additional payments to Gulf of over $144,000,000.

[3]As indicated in the Brief in Opposition to the Petition filed by Texas Eastern, it is far from clear that the arbitration provisions of the contract cover the issues Gulf, at the last minute, proposed to submit to arbitration. Texas Eastern has taken the position that they do not. (III App., pp. 1623-1624).

customers will eventually pay the total price, but they receive some compensation for the higher gas costs resulting from Gulf Oil's breach by gaining the time value of returned amounts.

The powers granted the Commission by Sections 7(c) and 16 of the Natural Gas Act, 15 U.S.C. §§717f(c) and 717o, include remedial powers to carry out the purposes of the Act, as the Third Circuit ruled in this case. The remedial power contained in Section 16 is a broad grant designed to provide an effective range of protection, as the court recognized in *Niagara Mohawk Power Corporation v. FPC*, 379 F.2d 153, 158-159 (D.C. Cir., 1967):

> The statutory authority to issue certificates or permits on condition implies broad authority to take effective action to achieve regulation in the public interest.
>
> * * *
>
> We observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.

This broad grant of power has been ruled to apply to refund questions arising from breach of certificate authority. *Mesa Petroleum Company v. FPC*, 441 F.2d 182 (5th Cir., 1971).[4] The exercise of this remedial power must have a reasonable basis

[4]With all due respect, New York submits that the Third Circuit was wrong in stating "that the interpretations of Section 16 in *Mesa* and *Mobile Oil* are irreconcilable." *Mobil Oil Corporation v. FPC*, 483 F.2d 1238 (D.C. Cir., 1973) addressed Section 16 in the contest of *procedural* requirements of a rule-making. It was decided by the District of Columbia Circuit after that Circuit's earlier decision in *Niagara Mohawk* and after the Fifth Circuit decision in *Mesa*. In spite of this, the opinion in *Mobil Oil* contains no suggestion that these opinions are inconsistent, to say nothing of purporting to reverse or limit them.

which balances the competing interests involved while upholding the regulatory authority of the Commission (*Id.* at 186-188.)

The Commission plan in the instant case meets the requirements of these decisions. Immediate return of amounts relating to the defaulted volumes provides relief to those customers who have borne a substantial portion of the costs of Gulf Oil's breach. Immediate refund provides the most effective means of relief. *FPC v. Tennessee Gas Transmission Company*, 371 U.S. 145, 154-155 (1962). Permitting Gulf Oil to recoup these refunds upon completion of its contractual obligations, while not originally supported by New York, provides incentive for Gulf Oil to fulfill its duties which in the present situation has proved extremely effective.[5] Thus, it presents a rational means of dealing with the competing interests which enables the Commission to afford gas consumers the complete bond of protection which the Act was intended to provide. *Atlantic Refining Company v. Public Service Commission*, 360 U.S. 378, 388 (1959).

III. The Decision In This Case Addresses A Narrow Question

Gulf Oil raises the specter of additional gas supply curtailments on the East Coast resulting from the Commission decision because of the "accelerated depletion of currently proven natural gas reserves" (Gulf Oil Petition, p. 27). This argument is disingenuous because Gulf Oil's continuing breach of its contract prior to the order in issue here meant that substantially less gas was made available to Texas Eastern, at a time when it was in deep curtailment, than under the most restrictive reading of the certificate.

More important, however, is the crucial distinction between Gulf Oil's warranty contract and the vast majority of gas purchase contracts. Gulf Oil warranted that it would have available a set level of gas (625 Bcf) every day over the life of the contract. Most conventional gas purchase contracts dedicate

[5]As a direct result of the refund condition, Gulf has for some time been delivering to Texas Eastern well in excess of 625 Bcf per day.

specific reserves under terms which at best cite the daily supply of gas the producer is obligated to deliver to determinations based upon the economic and physical characteristics of the reserves. Far from constituting a threat to overproduction, the conventional gas purchase contracts have led to Commission proceedings, so far largely abortive, to enforce producer contract obligations to expedite production thereunder. *See, Policy With Respect to Enforcement of Deliverability and Rendition of Natural Gas Services Under Certificated Arrangement, Docket No. RM76-8*, Order Nos. 539, 539-A, and 539-B (October 14, 1975; March 26, 1976, and, July 30, 1976, respectively).

The situation presented by Gulf's breach of its warranty certificate, though important on its own terms and in its effect on Texas Eastern and its customers, is unique. Unfortunately, the action taken by the Commission to remedy the situations can have little, if any, carry-over to the normal gas purchase contract. Gulf's efforts to blow the case up into one of general significance is thus totally without substance, even assuming that, contrary to fact, the general problem facing the gas industry was slowing down gas development and production rather than taking all available steps to accelerate it.

CONCLUSION

Gulf Oil Corporation's petition for writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted.

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REPLY TO BRIEFS AND MEMORANDA IN OPPOSITION TO THE PETITION

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REPLY TO BRIEFS AND MEMORANDA IN OPPOSITION TO THE PETITION

Petitioner Gulf Oil Corporation (Gulf) hereby replies to briefs and memoranda opposing the Petition filed on behalf of the Federal Energy Regulatory Commission (Commission), Public Service Electric and Gas Company (Public Service), Texas Eastern Transmission Corporation (Texas Eastern), and the Public Service Commission of the State of New York (New York).

ARGUMENT

I. The Decision Below As To A Conflict Between The Natural Gas Act And The Federal Arbitration Act With Regard To An Arbitration Provision In A Certificated Contract Should Be Resolved By This Court

The Commission asserts (Br., pp. 7-8) that because it has the responsibility under the Act to "insure compliance with certificates of public convenience and necessity," arbitration would have no "controlling effect" on the Commission, and it "would serve mainly the purpose of delay." These contentions by the Commission and its supporters do not deal with the basic issue which should be resolved by this Court—whether there is such a conflict between *arbitration* under the Federal Arbitration Act and *enforcement* of a certificated contract under the Natural Gas Act that the arbitration provision in the contract is a nullity. (See Petition, pp. 12-20).

Nowhere does the Commission address itself to this question.[1] The extent to which the Commission would be bound by a decision of the arbiters is not relevant to the question of whether otherwise arbitrable issues should be submitted to arbitration. *Carey* v. *Westinghouse Corporation*, 375 U.S. 261, 271-272 (1964) (cited by the Commission, p. 9, n. 6), held that even where authority of the National Labor Relations Board to override the arbiters' decision is expressly provided for in the National Labor Relations Act, arbitration should, nevertheless, proceed:

> "*Thus the weight of the arbitration award is likely to be considerable*, if the Board is later required to rule on phases of the same dispute. * * * Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling, would, of course, take precedence; * * *. *Yet * * * the possibility of conflict is no barrier to resort to a tribunal other than the board.*" (Emphasis supplied)

[1] The Commission's distinction of *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956), on the ground that this Court in *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137 (1960), recognized that where there is a conflict between the Natural Gas Act and a provision in the contract the Act prevails misses the point. *The question here is whether such a conflict exists.*

See also, *Retail Clerks Local 588* v. *National Labor Relations Board*, —— F.2d —— (D.C. Cir. No. 76-1722, November 4, 1977). Unlike the situation in *Carey* involving the National Labor Relations Act, there is no need for the Court to determine here, where the Natural Gas Act is silent, what effect the Commission should give the arbiters' decision. (See discussion in Gulf's Petition at page 20.)

The decisions in *Carey* and *Wilko* v. *Swan*, 346 U.S. 427, 438 (1953), highlight the desirability of reconciling the purposes of both Acts before one is set aside for the other.[2] The policy of the Natural Gas Act, as expressed by this Court,[3] to protect natural gas consumers is easily reconciled with the policy of the Federal Arbitration Act to encourage arbitration of contract disputes, particularly where, as here, the arbitration was provided for in the contract submitted for approval to the Commission and approved by it.

[2] See also *Scherk* v. *Alberto-Culver Company*, 417 U.S. 506 (1974), where the Court's analysis of the Securities Act of 1933 and the Securities and Exchange Act of 1934 laid great stress on the fact that the provisions of the 1933 Act construed in *Wilko* v. *Swan*, *supra*, guaranteed a court forum for determination of the controversy while the 1934 Act provided an individual cause of action only by implication. There are no provisions in the Natural Gas Act which on their face or by necessary implication preclude arbitration of contract disputes.

[3] *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944).

Contentions (New York Br., p. 3; Texas Eastern Br., p. 3) that the "public interest" requires that the Commission decide disputes between the parties as to interpretation of certificated contracts,[4] rather than first permitting them to be submitted to arbiters, fail to distinguish between the public interest in *enforcement* of a certificated contract and its *initial interpretation.* Interpretation and enforcement are different functions. Arbitration involves only the first. As has been said, once the contract issues have been passed on by the arbiters, the Commission can determine what enforcement, if any, is required. *Carey* v. *Westinghouse Corporation, supra.* No procedure for enforcement of the "delivery obligation" would be impaired by arbitration, as the Commission suggests (Br., p. 9, n. 5).

Furthermore, discussion (Texas Eastern Br., p. 3) of the merits of the arbitration issues begs the question.[5] In *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564, 568 (1960), this Court said, "The Courts therefore, have *no business weighing the merits* of the grievances * * *. The agreement is to submit *all grievances to arbitration not merely those which the court will term meritorious.*" (Emphasis supplied.) The same must be said of a regulatory commission with regard to contract disputes submitted to arbitration by a procedure it had approved.

[4] The Commission's preoccupation (Br., pp. 7-8) with the supposed merger of the contract with the certificate obscures rather than enlightens the problem. As the Court of Appeals pointed out, there is "little substance" to the certificate as such, because its scope is largely "defined by the terms of the contract" (Appendix A, p. 8a).

[5] Contrary to the view of the Commission (Br., p. 11, n. 8), the substantive issues submitted to arbitration are encompassed by the questions presented in the Petition and will remain for resolution after the threshold question of arbitrability is resolved. Before the Commission and the court below, Gulf showed that the record in this case is incomplete for resolution of the arbitration issues on the merits (see Petition, pp. 10, 18).

The Commission points out (Br., p. 9) that the cases cited by Gulf (Pet., pp. 16-17) did not involve a certificated contract under a regulatory statute. This is true of *all* cases cited by *all* parties. There is no case on that precise point. However, the cases cited by Gulf (Pet., pp. 16-17) enunciate and apply Congressional policy favoring arbitration in numerous situations. The Commission cites no arbitration cases other than *Carey* v. *Westinghouse Corporation, supra.* Cases cited by New York (Br., p. 3) and Texas Eastern (Br., p. 4), such as *Wilko* v. *Swan, supra,* and *Cobb* v. *Lewis,* 488 F.2d 41 (5th Cir. 1974) involving the Securities Act of 1933, antitrust and other statutes, held that Congressional policy *expressed in those statutes* invalidated the arbitration provisions involved. Such decisions are inapposite to the question of whether an irreconcilable conflict exists *here* between the initial construction of a contract by arbiters under the Arbitration Act and ultimate enforcement of the certificate by the Commission under the Natural Gas Act. As Gulf has shown, there is no reason why the purposes of both Acts cannot be effectuated by adherence to the initial procedure for settling disputes in the manner certificated by the Commission, leaving the scope of its enforcement duties to be determined upon receipt of the arbiters' decision.

The effect of the decision below is to invalidate arbitration provisions generally in certificated contracts on the sole ground of an assumed conflict with the Commission's enforcement powers. That conflict does not exist. Arbitration provisions are common in gas contracts. For the first time here, the Commission has assailed their application, although they have been involved in other Commission proceedings.[6] It does little good to say that the

[6] *Shell Oil Company* v. *Federal Power Commission,* 292 F.2d 149 (3d Cir.), cert. den. 368 U.S. 915 (1961); see also *O'Meara* v. *Texas Gas Transmission Corporation,* 230 F.Supp. 788 (N.D. Ill. 1964).

arbitration provision can be salvaged to settle "private" contract disputes between the parties. The disputes here are the kind of contract disputes most likely to occur. Furthermore, the arbitration provision, to the Commission's knowledge when it issued the certificate, covered *all* disputes under the contract.

If the decision below is allowed to stand, arbitration provisions in hundreds, if not thousands, of gas contracts will be nullified. This is a matter of substantial importance in the administration of the Natural Gas Act and in recognition of the right of natural gas companies to rely on provisions in their contracts which are neither prohibited by the Act nor nullified by conditions in the certificates issued by the Commission.

II. The Conflict With Decisions Of This Court As To Commission Power To Order "Reparations" Or "Refunds" And The Conflict Between The Circuits In The Construction Of Section 16 Of The Natural Gas Act Should Be Resolved By This Court

The Court of Appeals, the Commission, and other parties concede that the "refund" order in this case is unprecedented (*e.g.*, Appendix A, pp. 28a-32a) and describe the "remedy" as "novel" (*e.g.*, Commission Br., p. 9). Gulf has shown that the holding below as to Commission power to issue such an order conflicts with this Court's constructions of Sections 4 and 7 of the Natural Gas Act (Pet., pp. 21-23); results in a conflict in the Circuits in construction of Section 16 of that Act (Pet., pp. 24-25); and presents a question of Commission authority which is of increasing importance during a natural gas shortage as claims for "damages" and "compensation" mount (Pet., pp. 25-26).

None of the opponents to the Petition presents persuasive reasons why this Court should not review and resolve these questions expeditiously. None attempts to

reconcile the holding below with limitations on Commission powers to order "reparations" or "refunds" recognized in *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944); *United Gas Improvement Company* v. *Callery Properties*, 382 U.S. 223 (1965); and *Federal Power Commission* v. *Sunray DX Oil Company*, 391 U.S. 9 (1968).[7] None can erase the express recognition by the court below of the conflict with construction of Section 16 of the Act by the Court of Appeals for the District of Columbia Circuit;[8] and none can refute general applicability of the construction below of Section 16 to all sales of natural gas subject to Commission jurisdiction.[9]

In essence, the opponents argue that factual circumstances in this case warranted the drastic "remedy" chosen by the agency, and that a desired result can justify a conclusion that agency authority to fashion such a "remedy" is virtually unlimited (see New York Br., pp. 4-6; Public Service Br., p. 2; Commission Br., p. 10). The arguments, however, ignore reality. The facts are that the "refund" order is in direct conflict with the "filed rate" under Section 4 of the Act; that the Commission has *no* power to order refunds under Section 7(c) after issuance, as here, of an *un*conditioned permanent certificate under Section 7(c); and that both the Commission and the court below necessarily recognized that there had been *no* "abandonment" by Gulf to which Section 7(b) of the Act could apply (Appendix A, pp. 31a-37a). The facts in this case simply are not the same circumstances presented under Section 7(b) of the Act in *Mesa Petroleum Company* v. *Federal Power Commission*,

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[7] See discussion in the Petition at pp. 21-23.

[8] See statements by the court at Appendix A, pp. 31a-37a, and discussion in the Petition at pp. 24-25.

[9] See Petition, pp. 25-26, and cases cited at p. 26, n. 20.

441 F.2d 182 (5th Cir. 1971), the principal case relied upon by the opponents and the court below.

Section 16 of the Act, as construed by the District of Columbia Circuit,[10] the Eighth Circuit,[11] and this Court,[12] also cannot provide elastic, substantive authority for a "reparations" or "refund" order, as the opponents argue. Those courts and this Court have warned against expansive reading of Section 16 which, in the last analysis, is the purported substantive basis for the "refund" order in this case. Contrary to the arguments here (New York Br., p. 5, n. 4), the court below correctly saw "irreconcilable" conflict in construction of Section 16 by the circuits (Appendix A, p. 37a). That conflict can be resolved only by this Court.

Further, whether a contract contains "warranty" language or not is irrelevant to the questions of "refund" power presented in this case. The holding as to Sections 7(c) and 16 is that upon a finding of delivery deficiency under Section 7(c), the Commission then can proceed beyond ordering compliance with Section 7(c) and can issue "refund" and monetary payment orders under Section 16. The holding therefore is applicable to *any* certificate issued under Section 7(c), and the expansive substantive construction of Section 16 is in derogation of any "filed rate" heretofore binding and controlling monetary payments under Section 4. The "unprecedented," "novel" remedy fashioned in this case thus does present questions of general applicability under the Act which cannot be minimized, particularly during a shortage of natural gas.

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[10] *Mobil Oil Corporation* v. *Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973).

[11] *Murphy Oil Corporation* v. *Federal Power Commission*, 431 F.2d 805 (8th Cir. 1970).

[12] *Federal Power Commission* v. *Texaco Inc.*, 417 U.S. 380 (1974).

III. Use Of "Swing Provisions" In Producers' Contracts Presents Questions Of Importance That Should Be Resolved

As on other issues, opponents argue that "warranty" language in the Gulf contract minimizes the importance of the holding below which converts a "swing" provision into a continuous daily delivery obligation (New York Br., pp. 6-7; Public Service Br., pp. 2-3; Commission Br., pp. 10-11). The issue cannot be so limited because of widespread industry use of such provisions and the customary equation of the maximum quantity with cold-weather "peaking" demands (see Petition, pp. 27-29). Quite correctly, the court below was troubled by the Commission construction and apparently affirmed on this issue with reluctance (see Appendix A, pp. 9a-11a).

Strangely, the Commission now purports not to understand what is meant by "peaking" (see Commission Br., p. 11, n. 8). Yet, in 1963, in granting certificates to Gulf and Texas Eastern the Commission made findings as to Texas Eastern's intent to use the Gulf supply to take higher quantities on "peak" days (I App. 54-68); the 1963 Staff Memorandum analyzed this contract in terms of the "swing provision" (see Petition, p. 11, n. 10); and throughout the 1960s and early 1970s, the Commission had considered such provisions in its own rulemaking proceedings (see Petition, p. 27, n. 21).

These statements in the Commission's Brief underscore the errors of the Commission in this case in construing a "swing" provision, and the necessity for correction of an error that can affect conclusions as to daily delivery obligations under thousands of contracts.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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